

# **GUARDIANS OF THE REPUBLIC**

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United States Army in partial satisfaction of the requirements  
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The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, the Department of Defense, or any other governmental agency.

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## **GUARDIANS OF THE REPUBLIC**

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*[Polemarchus:] And are you stronger than all these? for if not, you will have to remain where you are.*

*[Socrates:] May there not be the alternative, I said, that we may persuade you to let us go?*

*[Polemarchus:] But can you persuade us, if we refuse to listen to you?<sup>1</sup>*

## I. Introduction

### A. A philosophical inquiry into the justice of court-martial panel composition

This paper addresses the question of whether it is just that the commanding officer who convenes a court-martial selects the voting members of the court-martial panel. To ask whether a practice is just presupposes that some things are just and others are not, and that we can tell the difference. Also, it is a different question than asking whether it accords with constitutional principles or with positive law. Those are important questions, but they are not our question. To pursue a meaningful answer to our question, this paper attempts an “interdisciplinary” approach of employing philosophical reasoning, with historical and literary illustration, in the evaluation of a legal practice. The second part of this introduction distinguishes philosophical reasoning from legal reasoning to clarify the paper’s use of sources and “authorities,” which will differ from Anglo-American legal practice.

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<sup>1</sup> PLATO, THE REPUBLIC 4 (Benjamin Jowett trans. 1871, Barnes & Noble 2004) (circa 380 B.C.). I have generally quoted and cited the classic Benjamin Jowett translations of Plato, while consulting the 2003 Loeb Classical Library edition of *The Republic* on matters of philosophical terminology; Loeb Classical editions have parallel text, with Greek or Latin on the left page and English on the right. In the use of ancient sources, I have given the page numbers of the particular modern edition, in keeping with the practice of legal citation, rather than the traditional citation forms used in classical scholarship.

The first substantive portion of the paper will offer an elementary model of natural law reasoning as a point of departure for thinking about law and justice. Although the term “natural law” has many implications, in this paper it stands for the modest common sense proposition that some rights and duties can be discerned, by operation of our reason, from our common humanity and our human relationships. Natural law reasoning has been extended far beyond this basic proposition – but not in this paper, which concedes that disagreement is reasonable and inevitable in the application of this proposition.

Because our philosophical question is practical, the paper next turns to the practical philosophers of the ancient world, the Roman Stoics, for insights that will enhance our appreciation of basic natural law reasoning as it applies to human equality and government institutions. We will see that some political philosophers – especially Plato, whose influence has been so profound in Western philosophy – posited that government power should be employed to create societies characterized by unified effort in pursuit of a single vision of the ideal society. In contradistinction to the idea that a common human nature justifies or necessitates agreement on the character of the perfect human community, we posit pluralism – the idea that human values conflict to such an extent that, in accordance with the principle of human equality, government power should not be employed to enforce an agenda in furtherance of one particular vision of the ideal human community. To illustrate the danger of government power in the service of an intolerant utopian vision, we see how the rise of the murderous National Socialist regime (among others) was a problem not of democracy or positive law, but of pluralism.



Next we note Plato's belief that all values properly understood do not conflict, which does not comport with our human experience. Leaving to others the question of whether such reconciliation is possible in another metaphysical plane, we employ Sophocles' *Antigone* to illustrate how valid moral obligations, cognizable in our own model of natural law reasoning, may be irreconcilable. Accepting that our duties may conflict, we accept that they must be prioritized.

Returning to Plato as a writer on justice, we ask whether, notwithstanding his dubious postulation that values do not conflict, his views on justice may be helpful to our understanding in the context of a community in which the conflict of values is functionally resolved by agreement on a hierarchy of values. Assuming, that is, a situation in which the conflict of values is overcome by agreement that a particular value is of paramount purpose, our objection to Plato's anti-pluralism may no longer be pertinent, and his analysis of a just society may be instructive. An illustration of an entire society organized around a paramount purpose is classical Sparta, whose anti-pluralistic model we would not wish to emulate. On the other hand, there is a segment of our open society, the armed forces, that have such a paramount purpose. Thus there are certain resemblances between Sparta and our armed forces, and, more importantly, there may be relevance in Plato's views on justice in the context of a single- or paramount-purpose society, which is not pluralistic.

By philosophical reasoning, such as differentiating means from ends, and making value judgments *within an understood context*, we are then prepared to understand that the armed forces need not be pluralistic in the same way that civil society must be pluralistic to

accord with the principle of human equality. Indeed, we will see that within the armed forces, there are formal divisions of rank that reflect authority and responsibility for governing the armed forces as a specialized segment of our otherwise pluralistic society. This is so because the armed forces have a special role that requires professional expertise in self-governance. Bearing in mind this distinction between the armed forces and the larger society, we will be prepared to understand that the nature and purpose of a court-martial panel differ from that of a jury in a civilian court. That is, a jury in a civilian court is essentially a democratic institution reflecting the pluralism of the civil society, while a court-martial panel is essentially an executive office reflecting the role of the armed forces as holders of a public trust for the particular purpose of national security. That conclusion is philosophically supported by Plato's reasoning in *The Republic*, but its context must be carefully circumscribed, or our defense of undemocratic court-martial panels will conflict with the pluralism of our open society.

#### B. Philosophical inquiry as dialogue

When Mortimer Adler needed a title for the introductory volume of his ambitious *Great Books of the Western World* series, he chose *The Great Conversation*.<sup>2</sup> "The goal towards which Western society moves," he wrote in his introduction, "is the Civilization of the Dialogue."<sup>3</sup> If dialogue is the goal, the danger is that society instead can degenerate into

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<sup>2</sup> Mortimer J. Adler, *The Great Conversation*, in 1 GREAT BOOKS OF THE WESTERN WORLD 1 (Mortimer J. Adler ed., 1952).

<sup>3</sup> *Id.* He continued, "The spirit of Western civilization is the spirit of inquiry. Its dominant element is the Logos." *Id.*

a cacophony of simultaneous monologues. Everyone has the right to be heard, but who has the patience to listen? Dialogue requires us to listen before judging, and then to judge on the merits of the argument, not simply on the identity or authority of the speaker.

In Sophocles' *Antigone*, when a ruler's son tries to dissuade him from an obstinate course of action, the ruler contemptuously asks the chorus of elders, "Should we that are my age learn wisdom from young men such as he is?"<sup>4</sup> A different ruler, the Roman emperor and Stoic philosopher Marcus Aurelius Antoninus, would have readily answered yes. In his personal notes,<sup>5</sup> Marcus Aurelius often reminded himself to "reconsider a decision if anyone present should correct you and convince you of an error of judgment."<sup>6</sup> No wonder, then, that Marcus Aurelius could appreciate the works of Plato.<sup>7</sup>

Plato engaged in philosophy by constructing "dialogues," idealized conversations about humanity and the universe, and "[t]he open-ended nature of Plato's dialogues has

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<sup>4</sup> SOPHOCLES, *Antigone*, THE THEBAN PLAYS 165 (David Grene trans., Everyman's Library 1994) (circa 441 B.C.).

<sup>5</sup> On the origin of these philosophical reflections, Pierre Hadot concluded that "the *Meditations* belong to that type of writing called *hypomnemata* in antiquity, which we could define as 'personal notes taken on a day-to-day basis.'" PIERRE HADOT, THE INNER CITADEL 31-2 (Michael Chase trans., Harvard 1998) (1992).

<sup>6</sup> MARCUS AURELIUS ANTONINUS, MEDITATIONS 66 (Maxwell Staniforth trans., Penguin Classics) (circa A.D. 175); see also *id.* at 96 ("If anyone can show me, and prove to me, that I am wrong in thought or deed, I will gladly change.") and 104 ("Accustom yourself to give careful attention to what others are saying, and try your best to enter into the mind of the speaker."). In this passage, the Staniforth translation was more rhetorically appropriate, but I have generally cited the 2002 Modern Library translation by Gregory Hays. On matters of Greek terminology, I have referred to the Loeb Classical Library edition of 1999; Loeb Classical editions have parallel text, with Greek or Latin on the left page and English on the right.

<sup>7</sup> MARCUS AURELIUS ANTONINUS, MEDITATIONS xxxi-xxxii (Gregory Hays trans., Modern Library 2002) (circa A.D. 175) ("Marcus quotes Plato repeatedly (especially in Book 7), and Socratic or Platonic elements can be discerned elsewhere too.").



prompted other thinkers to continue the tradition of philosophical discussion for twenty-four centuries.”<sup>8</sup> The questions and answers contained in Plato’s dialogues are relevant to a host of perennial political and ethical questions, but they are not the final word. In the “great conversation” of philosophical inquiry, there is no Supreme Court whose precedents are binding on us. The quotations and citations in this paper mostly represent, and document the effort to represent accurately, what has been said before. Philosophical precedents, however, are only grist for the mill, and we must apply them to present and immediate questions by our own intellectual effort.

This thesis is therefore participatory: it is not, unfortunately, a virtuoso performance for the reader to enjoy as spectator. Moreover, even if it succeeds in intervals at being Socratic, the Socratic method requires an active interlocutor. In the present instance, this paper examines whether it is fundamentally fair that members of the armed forces are tried by a court composed of their military superiors rather than by a court of their peers. This practice seemingly conflicts with Western (and especially American) values like democracy and equality. How can we accept these values and defend such a practice? Are there values other than democracy and equality that support the practice – and how can we reconcile these other values with democracy and equality? Undemocratic panel composition cannot be justified by any amount of description or historical research because the question is philosophical, not legal or historical. In articulating why panel composition might be

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<sup>8</sup> Pedro de Blas’s Introduction in *PLATO, ESSENTIAL DIALOGUES OF PLATO* viii (Benjamin Jowett trans. 1871, Barnes & Noble 2005) (circa 385 B.C.).

legitimate despite being undemocratic, we must consider the origins of authority, duty, and law.

As the foundational treatise on Western political theory, Plato's *Republic* provides a critical apparatus that challenges the prevailing notion that democratic sanction is the final word in matters of justice. The questions asked and the positions taken by the interlocutors compel rigorous analysis. The well established criticism that the argument of the book is not pluralistic, moreover, is hardly disqualifying, even if true, because the military is not ultimately a pluralistic society: its paramount purpose is to ensure national security.

The inherent tension in military justice between the need for good order and discipline and the rights of the individual may be reconciled by understanding the rule of law as something more than the opinion of the majority or the opinion of those in power. Legal process, according to the conception of law as proceeding from nature, is neither a political concession to an underclass nor an obstacle to maintaining order.

## II. Nature and Law

### A. A minimalist model of natural law reasoning

The term "natural law" is heavily freighted, but in this paper stands merely for the initial proposition that legal rights and duties may be discerned, by reason, from nature.<sup>9</sup>

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<sup>9</sup> "By natural law is meant a law which determines what is right and wrong and which has power or is valid by nature, inherently, hence everywhere and always." LEO STRAUSS, *STUDIES IN PLATONIC POLITICAL*

This proposition has certain premises and many possible implications; participation in the project of this thesis requires acceptance of the premises (at least *arguendo*), but does not require acceptance of all that has been written about or characterized as natural law thinking.<sup>10</sup> To be explicit, Christian philosophers co-opted, in turn, Stoicism,<sup>11</sup> Platonism,<sup>12</sup> and Aristotelianism,<sup>13</sup> with the result that natural law reasoning was conducted in the context of the Judeo-Christian tradition.<sup>14</sup> Note, however, that the Stoics, Plato, and Aristotle were neither Jewish<sup>15</sup> nor Christian – and therefore the classical natural law tradition should not be mistaken as dependent on suppositions that derive from revealed religion.<sup>16</sup>

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PHILOSOPHY 137 (1983). “Laws, in their most general signification, are the necessary relations arising from the nature of things.” Charles de Montesquieu, *The Spirit of Laws*, in 38 GREAT BOOKS OF THE WESTERN WORLD 1, 1 (Thomas Nugent trans., Mortimer J. Adler ed., 1952) (1748).

<sup>10</sup> “[Aristotle] does not make the distinction made by Thomas Aquinas between the unchangeable principles and the changeable conclusions.” STRAUSS, *supra* note 9, at 140. We begin by making that distinction, and illustrating the distinction with an elementary model of the common sense principles in action.

<sup>11</sup> “When the author of John’s Gospel tells us that ‘the Word’ – *logos* – was with God and is to be identified with God, he is borrowing Stoic terminology.” MARCUS AURELIUS, *supra* note 7, at xx. “This Logos, which Socrates had partly anticipated, had taken on human form in Christ, as the fourth gospel says, for Christ there appears as the creative power of the Word through which the world was made.” WERNER JAEGER, *EARLY CHRISTIANITY AND GREEK PAIDEIA* 28 (1961).

<sup>12</sup> See JAEGER, *supra* note 11, at 36–46 (“Plato’s Ideas ... were now interpreted as the thoughts of God” *Id.* at 45). Citing many examples of Christian apologetics adopting Greek philosophical terminology, Professor Jaeger noted, “This repeats itself all the time in the history of Christianity, in the way the classical heritage is incorporated in the structure of Christian thought.” *Id.* at 21.

<sup>13</sup> See *infra* note 17.

<sup>14</sup> See, e.g., John Locke on the natural law of property: “God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life and convenience.” John Locke, *An Essay Concerning the True Original Extent and End of Civil Government*, in 35 GREAT BOOKS OF THE WESTERN WORLD 25, 30 (Mortimer J. Adler ed., 1952) (1690).

<sup>15</sup> “The Old Testament, whose basic premise may be said to be the implicit rejection of philosophy, does not know ‘nature’: the Hebrew term for ‘nature’ is unknown to the Hebrew Bible.” LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 81 (Univ. of Chi. paperback, 1965) (1953).

<sup>16</sup> My insinuation is precisely that, in our secular republic, natural law is feared as inseparable from theistic premises and theocratic implications, but such a fear seems not to take into account the pagan origins of natural law reasoning. This may be seen as a great irony.

This section of the paper will discuss the initial premises of a minimalist natural law model.<sup>17</sup> The necessary propositions may be stated simply:<sup>18</sup>

(1) Purpose is the principal criterion in making judgments of quality. A good hammer is good at driving nails, while a good screwdriver is good at driving screws. A hammer is not a bad hammer if it works poorly as a screwdriver, and a quality screwdriver may perform poorly at the task of driving nails. The characteristic that we call quality, or fitness, or justness, depends on purpose.<sup>19</sup>

(2) An object may be used for a purpose other than the purpose for which it was created, as, for example, a heavy paperweight may be used as a hammer. Such use does not obliterate the distinction between paperweights and hammers. Although any number of

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<sup>17</sup> This formulation as the basic model of natural law thinking derives from Aristotle's *Analytica Posteriora*, which famously set out his system of definition according to (1) formal cause, (2) material cause, (3) efficient cause, and (4) ultimate cause. The "ultimate cause" definition of a thing derives from its *telos*, meaning goal or purpose. Aristotle, *Analytica Posteriora*, in INTRODUCTION TO ARISTOTLE 94-7 (G.R.G. Mure trans., Richard McKeon ed., Modern Library 1992) (circa 330 B.C.). Thomas Aquinas applied this "teleological" mode of definition in his theological treatises, including those in the *Summa Theologica*, in 19-20 GREAT BOOKS OF THE WESTERN WORLD (Fathers of the English Dominican Province trans., Mortimer J. Adler ed., 1952) (1273). Below, this paper draws on Roman Stoic texts that I have and re-read, with relatively little reference to secondary sources; in contrast, my notions about Aristotelian philosophy derive principally from secondary sources in the Aristotelian tradition, such as ROBERT J. SPITZER ET AL., *HEALING THE CULTURE* (2000) and JOSEPH KOTERSKI, *NATURAL LAW AND HUMAN NATURE* (Teaching Co. 2002) (audio recording).

<sup>18</sup> "According to Xenophon, Socrates' art of conversation was twofold. When someone contradicted him on any point, he went back to the assumption underlying the whole dispute ... [or] he proceeded through generally accepted opinions and thus produced agreement to an extraordinary degree." LEO STRAUSS, *THE CITY AND MAN* 53 (1964). This paper involves modest attempts at both modes, beginning with the latter (which Professor Strauss saw as less profitable and suitable only for lazy interlocutors) to establish a basis for discussion, then proceeding to the more challenging mode of identifying the philosophical bases for disagreement on the examined questions.

<sup>19</sup> Inherent in the action of making value judgments based on any criterion is the existence of and human participation in the rational mental function that the Stoics called *logos* – reason. If the reader will not accept this supposition on the basis that she is reading this text at the present moment, nothing I could say would possibly be more compelling.



paperweights have been used to drive nails, carpenters do not buy and use paperweights as construction tools because hammers, having been formed in accordance with their purpose, are more suitable and effective at driving nails.

(3) If an object has more than one purpose, evaluation of its quality begins within the context of a particular purpose, but is then complicated by assigning relative value to its multiple functions. If I have a hammer with a handle that tapers into a screwdriver, it may serve as both a hammer and as a screwdriver, but its quality depends on its performance of one of its tasks: this combination tool may be too light to be a good hammer, or the head on the screwdriver may be made of too weak metal and become warped with use. The evaluation of a multiple-purpose tool requires us to begin by identifying the purpose that is the criterion by which we are judging it. We can make judgments about its overall quality only after making judgments about its quality in the context of particular purposes.

(4) If a tool has a single purpose, we can use tests and statistics to debate its quality in comparison with another tool intended for the same purpose. That is, having agreed that we want a hammer to drive nails, we can have a constructive discussion of which hammer is best. We might disagree on which hammer to buy, but at least we can understand each other's arguments because we have agreed that we want something with which to drive nails.

(5) On the other hand, if we are choosing between two multiple-purpose tools such as the combination hammer-screwdriver described above, we may reach an impasse by failing to agree on which purpose should be given priority. If you are more concerned with driving



nails, and I am more concerned about turning screws, we may be unable to agree on which is the best multiple-purpose tool. This disagreement results from a difference in prioritizing conflicting values.

If we apply these basic propositions about purpose to human communities, we derive the following initial suppositions regarding institutions, respectively, each of which will be developed at further length and complexity as the paper continues:

(1) Evaluation of an institution (be it a school, an army, or a court) logically begins by identifying the institution's purpose. Not to identify the institution's purpose invites the danger that we will grade it according to the wrong criteria of fitness.

(2) The existence of alternatives to an institution does not demonstrate that the institution lacks purpose or quality: many nails have been driven into office walls with paperweights, yet a hammer remains the superior tool for the purpose of driving nails.

(3) In a free and open society, citizens evaluate government institutions based on the purpose of government *as they see it*. Because not everyone posits the same vision of an ideal society, different people use different criteria to evaluate government institutions. This is an unavoidable basis of political conflict. Indeed, the record of attempts to create ideal societies by using government power to impose a singular vision of human purpose is a record of misery and murder.

(4) If a government institution has a single agreed-upon purpose, it may be evaluated on the basis of its fitness for that purpose. Although people manage to find conflict as to means even when they agree on ends, agreement as to purpose at least makes possible discourse at the practical level of policy implementation.

(5) If, however, an institution has more than one purpose, the conflicting purposes can be reconciled only by agreement on a priority that orders the purposes.<sup>20</sup> When that is impossible – as it is impossible for a free and open society as a whole to agree on either the purpose of government or the priority of government purposes – disagreements as to purpose will remain, making impossible evaluation according to agreed-upon criteria. One citizen may value public safety more highly than promoting fuel efficiency, while another citizen values health care more highly than education. In the public debate on these issues, however, all contenders will employ basic natural law reasoning.

Thus basic natural law reasoning does not compel agreement with a particular conclusion on every political issue, as some have imagined or feared, but does provide a common sense model for constructive discourse.<sup>21</sup> The past masters of practical philosophy

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<sup>20</sup> Having written this analogy, I later found the following splendid parallel in a passage by Leo Strauss *contra* relativism: “[S]ocieties and their parts have many needs that conflict with one another: the problem of priorities arises. This problem cannot be solved in a rational manner if we do not have a standard of reference . . . and discern the hierarchy of the various types of genuine needs.” STRAUSS, *supra* note 15, at 3.

<sup>21</sup> Platonic scholar Leo Strauss opined that nature (*physis*) “was discovered by the Greeks as in contradistinction to art . . . and, above all, to *nomos* (law, custom, convention, agreement, authoritative opinion),” and thus “the notion of ‘natural law’ (*nomos tes physeos*) is a contradiction in terms rather than a matter of course.” STRAUSS, *supra* note 9, at 138. In the ancient authors, the contradistinction is certainly there, but the alleged “contradiction in terms” was apparently not seen by the ancient philosophers, as I believe will be made clear even in the course of this elementary paper. I will not presume to dispute Leo Strauss, but I am happy to let Werner Jaeger do so: Greek education, he wrote, “had always derived its norms of human and social behavior from the divine norms of the universe, which were called ‘nature’ (*physis*). Christian interpreters (and not only

based on common sense natural law thinking were the Stoics.<sup>22</sup> The Stoic philosophers engaged theory for the purpose of reaching the ethically correct practical conclusions.<sup>23</sup> “Philosophy does not consist in sleeping on the ground, nor in writing dialogues, but in rectifying one’s character. It resides neither in sophistry, bookish dissertations, nor pretentious declamations, nor in ostentatiousness, but rather in simplicity.”<sup>24</sup> We turn then to the Stoics to begin to examine the implications of the proposition that rights and duties proceed from nature.<sup>25</sup>

## B. The Stoic understanding of natural law

The Stoics believed that human beings were, by their nature, best served by a cooperative approach to life.<sup>26</sup> Aristotle’s famous phrase that man is a political animal –

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they!) ought to remember that this Greek concept of nature is not identical with naturalism in our modern sense, but almost the opposite of it.” JAEGER, *supra* note 11, at 18. As we see in the next section of the paper, the Stoics believed that law (*nomos*) should conform to nature (*physis*) – and that this could be achieved by operation of reason (*logos*).

<sup>22</sup> “Natural law became a philosophic theme for the first time in Stoicism.” STRAUSS, *supra* note 9, at 140. As the early Stoics were concerned with metaphysics rather than ethics, this paper will instead call on the later (Roman) Stoics. Werner Jaeger noted that the project of these ethical philosophers of later antiquity was more modest than the achievement of Plato and Aristotle: “The systems of the Stoics and Epicureans that followed them in the early Hellenistic age are an anticlimax and show a decline from their creative philosophical power.” JAEGER, *supra* note 11, at 41. I call that praising with faint damnation.

<sup>23</sup> “Today philosophy is an academic discipline, one that few people other than professional philosophers would consider central to their everyday existence.” MARCUS AURELIUS, *supra* note 7, at xviii.

<sup>24</sup> HADOT, *supra* note 5, at 10. Simplicity indeed was key to the Stoic reconciliation of nature and law: “Run ever the short way; and the short way is the way of Nature [κατὰ φύσιν], that leads to all that is most sound in speech and act.” MARCUS AURELIUS, *supra* note 7, at 96-7.

<sup>25</sup> “The Stoic natural law teaching is the basic stratum of the natural law tradition.” STRAUSS, *supra* note 9, at 141.

<sup>26</sup> MARCUS AURELIUS, *supra* note 7, at 117 (“Nature designed rational beings for each other’s sake: to help – not harm – one another, as they deserve.”). More immediately to the American political tradition, John Locke wrote, “The state of Nature has a law of Nature to govern it, which obliges every one, and reason, which is that

more literally, an animal suited to a *polis* (πολις) (an independent city-state) – reflects a similar belief that civic goods and human happiness are rarely achievable in isolation.<sup>27</sup> The Stoics held that a person’s behavior and duty could be discerned by rational consideration of the nature of human beings, as individuals or as citizens or as members of a family, and how their desires could best be attained.<sup>28</sup> The Stoic concept of law was therefore universal, notwithstanding human differences. A Stoic aphorism asserted that (a) a city is a collection of people governed by the same law, (b) the world is governed by the universal law of nature, therefore (c) the world (*cosmos*, κοσμος) is a city (*polis*, πολις).<sup>29</sup> The Stoics were the original cosmopolitans. In the Stoic view, an individual’s rights and duties differed according to, but could be discerned according to, her relationships and her role in the world:

Remember that you are an actor in a play and not the author. The play may be long or short, and if you are to play the part of a poor man, see that you act the part in accordance with nature; if the part of a lame man, of a magistrate, of a private person, do the same. For your duty is to act well the part you are given – not to select the part.<sup>30</sup>

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law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions ...” Locke, *supra* note 14, at 26. Following the ellipsis, Locke relates equality to divine creation. *Id.* I omit this connection not to disguise the basis of Locke’s formulation, but because the Stoic parallel establishes that divine creation is not the indispensable basis (though, if accepted, is sufficient basis) for deriving equality from the nature of man.

<sup>27</sup> See ARISTOTLE, POLITICS 54-5 (Benjamin Jowett trans., Modern Library 1943) (“A social instinct is implanted in all men by nature....”). Plato’s Socrates makes a similar point about the origin of the city in the nature of human needs: “A State, I said, arises, as I conceive, out of the needs of mankind; no one is self-sufficing, but all of us have many wants.” PLATO, *supra* note 1, at 53.

<sup>28</sup> MARCUS AURELIUS, *supra* note 7, at 117 (“Injustice is a kind of blasphemy.”).

<sup>29</sup> *Id.* at 136 (“No difference between here and there: the city that you live in is the world.”); see also *id.* at 38-39, 70, 274; and MALCOLM SCHOFIELD, THE STOIC IDEA OF THE CITY 61 (Univ. of Chi. 1999) (1991), though Schofield quotes the later (in antiquity) author Clement of Alexandria who substituted οὐρανος (universe) where Marcus and other Stoics habitually used κοσμος (world).

<sup>30</sup> EPICTETUS, ENCHIRIDION 20-1 (George Long trans., Prometheus 1991) (circa A.D. 108).



Yet everyone had the same fundamental duty to act her role in accordance with the universal law of nature.<sup>31</sup>

By positing a universal law to which everyone was subject, the Stoics introduced an egalitarian component into a world characterized by hierarchy.<sup>32</sup> Indeed, the Roman politician and philosopher Seneca opined that slaves were more accurately “fellow slaves” (*conservi*) in that all people are subject to universal laws and duties.<sup>33</sup> This is not to say that Stoicism was a radical political program: the emperor Marcus Aurelius Antoninus and the freed slave Epictetus agreed that one’s worldly position was philosophically inconsequential (“indifferent” in the Stoic vocabulary) and should be placidly accepted.<sup>34</sup>

The Stoic contribution to the philosophy of social justice thus was not that it inspired uprising against injustice, but rather its insistence that justice can be discerned by rational consideration of what is in the best interests of human beings. In many ways, the Stoic approach is the antithesis of today’s political discourse, which emphasizes diversity rather than universality, rights rather than duties, and individuality rather than commonality. At a

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<sup>31</sup> See also EPICTETUS, THE DISCOURSES 9 (Christopher Gill ed., Everyman Library, 1995) (circa A.D. 108) (“Helvidius Priscus saw this too, and acted accordingly: for when Vespasian had sent word to him not to attend the Senate, he answered, ‘It is in your power not to allow me to be a senator; but as long as I am one, I must attend.’”).

<sup>32</sup> “It is sometimes asserted that the Stoics differ from Plato and Aristotle by being egalitarians.” STRAUSS, *supra* note 9, at 141.

<sup>33</sup> LUCIUS ANNAEUS SENECA (THE YOUNGER), EPISTLES 302-3 (Richard M. Gummere trans. 1917, Loeb Classical Library 2002) (circa A.D. 64).

<sup>34</sup> Compare “Do not admire your clothes, and you will not be angry with the man who steals them.” EPICTETUS, *supra* note 31, at 44, with “Do not be overheard complaining about life at court. Not even to yourself.” MARCUS AURELIUS, *supra* note 7, at 103. Epictetus was a slave and, as a freedman, an exile. *Id.* at xxiv-v. Marcus Aurelius was emperor of Rome. *Id.* at xi.



deeper level, however, the Western philosophical tradition, of which Stoicism was a key component, underlies and makes possible discussion of diversity, rights, and individuality.

The radically egalitarian implications of Stoic philosophy, independently and in that philosophy's influence on Christian apologetics, helped establish broad acceptance of the idea of equality under law. The Roman political precedent, notwithstanding the transition from Republic to Principate, was a society governed by law.<sup>35</sup> More immediately to the American experience, the modern natural law thinking of John Locke – together with the old original natural law thinking of the Stoics themselves – became foundational in American constitutionalism.

#### C. Natural law, equality, and democracy

*The Republic* has been called a blueprint for a fascist society on the grounds that it proposes that the wise – and only the wise – should rule.<sup>36</sup> If all values ultimately participate in a unity that we can comprehend and achieve, as Plato posits, then those who understand, supposedly, this ultimate truth feel entitled to impose virtue on the willing and unwilling alike.<sup>37</sup> There is a brutal logic to this theory that is at least defensible, and its philosophical error may be entirely in the premise and not in the conclusion. Plato's conjectured Republic would indeed be collectivist to the point of calling to mind the modern term "totalitarian."

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<sup>35</sup> STRAUSS, *supra* note 9, at 141.

<sup>36</sup> JOHN WILD, *PLATO'S MODERN ENEMIES AND THE THEORY OF NATURAL LAW* 4 (1953).

<sup>37</sup> *Id.* at 14.

Among the many possible objections to implementation of Plato's design, this paper addresses the one most readily discernible from human experience: human beings, being by nature imperfect in understanding, have a natural and inherent duty to respect the right of others to hold different values.

This argument can take as its point of departure a supposition from Plato's Socrates, who asks, "has not the soul an excellence?"<sup>38</sup> Here, "soul" translates *psyche* (ψυχή), which refers to the essential nature, and "excellence" translates *arete* (ἀρετή), which has often been translated as "virtue."<sup>39</sup> This excellence of the soul is likened to the ability of the eye to see and the ability of a knife to cut; it is fitness to perform work.<sup>40</sup>

The idea that the essential nature of a human being has a function and a goal<sup>41</sup> was developed by Plato's illustrious student Aristotle in his famous *Nicomachean Ethics*.<sup>42</sup>

Aristotle believed that happiness was the end result intended by human pursuits:

Now happiness above all else appears to be absolutely final in this sense, since we always choose it for its own sake and never as a means to something else; whereas honour, pleasure, intelligence, and excellence in its various forms, we choose indeed for their own sakes (since we should

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<sup>38</sup> PLATO, *supra* note 1, at 36.

<sup>39</sup> *Id.* at 103.

<sup>40</sup> *Id.* at 36.

<sup>41</sup> "[T]hings are defined by their working and power," wrote Aristotle specifically in the context of the human need for civic life. ARISTOTLE, *supra* note 27, at 55.

<sup>42</sup> This ethical treatise is named for Aristotle's son, Nicomachus, who has been variously cast as dedicatee, editor, and even author (presumably after the fashion of Arrian's transcription of Epictetus' teachings). ARISTOTLE, *NICOMACHEAN ETHICS* xiii (H. Rackham trans. 1926, Loeb Classical Library 2003) (circa 328 B.C.). "In any case, no one questions that the *Nicomachean Ethics* is the authoritative statement of Aristotle's system." *Id.*

be glad to have each of them although no extraneous advantage resulted from it), but we also choose them for the sake of happiness, in the belief that they will be a means to our securing it.<sup>43</sup>

Thus he distinguishes lesser goods on the grounds that they are always or sometimes means towards other ends, and not ends in themselves.<sup>44</sup> The Greek term for happiness used here, *eudaimonia* (ευδαιμονία), means more literally well-spirited,<sup>45</sup> and connotes happiness in the sense of fulfillment. The Army slang expression, “fat, dumb, and happy,” illustrates the regrettable sense in which the English word happiness may fail to convey the fuller meaning of Aristotle’s happiness, which is not the passivity of being a spectator and consumer, fed and entertained by others. In Aristotle’s sense, happiness is the consequence of acting in accordance with one’s social nature and full potential: “To say however that the Supreme Good is happiness will probably appear a truism; we still require a more explicit account of what constitutes happiness. Perhaps then we may arrive at this *by ascertaining what is man’s function.*”<sup>46</sup>

The Stoics also equated fulfilling human potential with attaining the humane virtues; Marcus Aurelius asks, regarding an adverse experience, “Does what’s happened keep you from acting with justice, generosity, self-control, sanity, prudence, honesty, humility,

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<sup>43</sup> *Id.* at 27-29.

<sup>44</sup> *Id.* at 25-27. In Plato’s *Republic*, the question of whether a good – specifically, justice – is an end in itself or merely a means to an end opens Book II. PLATO, *supra* note 1, at 39 (distinguishing “goods which he who would be happy desires both for their own sake and for the sake of their results”).

<sup>45</sup> *Id.* The *ευ-* prefix is seen in many English words of Greek origin, such as eugenics and euphoria.

<sup>46</sup> *Id.* at 31 (emphasis added).

straightforwardness, and all the other qualities *that allow a person's nature to fulfill itself?*<sup>47</sup>

In the context of a faith community, the “ultimate cause” of human life may follow logically from the doctrine of the faith.<sup>48</sup> In a free society, people have the opportunity to decide for themselves how to pursue happiness, not because there are no objective and universal values such as equality and justice, but rather because objective and universal values make clear to us that we should create and maintain a free society.<sup>49</sup>

This classical, Aristotelian meaning of “happiness” may have been immediately in mind when Thomas Jefferson wrote the word into our Declaration of Independence, since Mr. Jefferson later named Aristotle (first) among the sources on “public right” on which he drew in drafting that document.<sup>50</sup> Indeed, many of the founders were keen classicists, as

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<sup>47</sup> MARCUS AURELIUS, *supra* note 7, at 48 (emphasis added).

<sup>48</sup> “It is impossible for any created good to constitute man’s happiness. . . . Therefore God alone constitutes man’s happiness.” Aquinas, *supra* note 17, at 19 GREAT BOOKS OF THE WESTERN WORLD 1, 622. The Second Part of the Summa develops at length a doctrine of human happiness with reference to “the Philosopher’s” (that is, Aristotle’s) teleological definition. When I saw the Rev. Rick Warren’s 2002 best seller, *The Purpose Driven Life*, I was struck by the suitability of the term “purpose driven” as a working definition of the term “teleological,” and the book is indeed a treatise on God’s purpose for man. Rev. Warren acknowledged “the hundreds of writers and teachers, both classical and contemporary” who contributed to his work, but did not mention Aristotle or Thomas Aquinas. Though I am sure the content of his book has been helpful to many people, it might have been helpful in an additional way if he had noted that a pagan philosopher and a Roman Catholic theologian had framed the discourse.

<sup>49</sup> That is, the principle of human equality is evident in nature, and political mechanisms (forms of government) are instrumentalities to be conformed to nature: “To understand political power aright, and derive it from its original, we must consider what estate all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the law of Nature, without asking leave or depending upon the will of any other man.” Locke, *supra* note 14, at 25.

<sup>50</sup> WILLARD STERNE RANDALL, THOMAS JEFFERSON: A LIFE 273 (HarperPerennial, 1994) (1993) (also naming Cicero and, of course, John Locke). “It was a felicitous, memorable turn of phrase, the most succinct expression ever of American political philosophy.” *Id.* at 275.



demonstrated by their reading<sup>51</sup> and their use of classical terms: “The Romans captured the American imagination because they had done what the Americans themselves hoped to do – sustain an extensive republic over a course of centuries. So the society of Revolutionary War officers called themselves the Cincinnati; ‘president,’ ‘congress,’ and ‘senate’ were all Roman terms.”<sup>52</sup>

To the modern ear, “life, liberty, and the pursuit of happiness” may seem to end weakly and I have noted lecturers and public speakers hastening to replace John Locke’s original term<sup>53</sup> “property” to add gravity. But the pursuit of happiness is profoundly a human right of the first order, especially when happiness is understood to mean fulfillment of one’s nature and potential. A just government’s function, according to the Declaration, is to protect everyone’s life and liberty, and to allow individuals to pursue goals and aspirations of their own choosing.<sup>54</sup> In this sense, “democratic” government is not the end itself, but the means towards ultimate ends to be determined by the individual pursuers of happiness. Government exists merely to facilitate the pursuit of happiness, not to dictate its terms.

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<sup>51</sup> “Washington acquired a copy of [Stoic philosopher] Seneca’s *Morals* in his late teens, and he quoted lines and phrases from [Joseph Addison’s play] *Cato* all his life.” RICHARD BROOKHISER, *FOUNDING FATHER* 123 (Free Press Paperbacks 1997) (1996). “Jefferson’s prose style was decidedly classical, owing much to Cicero’s periodic sentences.” RANDALL, *supra* note 50, at 23.

<sup>52</sup> *Id.* at 122; *see also* Max Lerner’s introduction in ARISTOTLE, *supra* note 27, at 24.

<sup>53</sup> RANDALL, *supra* note 50, at 275.

<sup>54</sup> “In marvelously few words, Jefferson asserted the rule of right reason that philosophers since Thomas Aquinas had taken volumes to argue . . .” *Id.* True, but Mr. Jefferson had no citation requirements.



Note what, specifically, the Declaration of Independence held to be self-evident:<sup>55</sup> equality and the unalienable rights of life, liberty, and the pursuit of happiness. Consensual government is not itself self-evident, but rather follows in consequence of equality, which is self-evident. Moreover, government is merely the means to serve other ends, “to secure these rights.” The distinction is consequential when we evaluate government according to our basic natural law model, which established that purpose determines quality. If the purpose of government is to protect unalienable rights and facilitate the pursuit of happiness, then it follows that government is successful when rights are protected and the conditions facilitating the pursuit of happiness have been created. Whether the government mechanisms are democratic is, in a fundamental sense, not the criterion for the success of a government.

What is more, a government may be democratic, perhaps extremely so, and be dysfunctional with regard to its purpose of protecting unalienable rights and securing the conditions that facilitate the pursuit of happiness.<sup>56</sup> By understanding government – any

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<sup>55</sup> This term was supplied by Benjamin Franklin in his capacity as Mr. Jefferson’s editor: “The most important of his edits was small but resounding. He crossed out . . . the last three words of Jefferson’s phrase ‘We hold these truths to be sacred and undeniable’ and changed them to the words now enshrined in history: ‘We hold these truths to be self-evident.’” WALTER ISAACSON, BENJAMIN FRANKLIN: AN AMERICAN LIFE 312 (Simon & Shuster Paperbacks, 2004) (2003). Mr. Isaacson attributes this term to Mr. Franklin’s reading of Hume, but I would call the reader’s attention to an alternative source: “[A]fter stumbling across some rhetoric books that extolled Socrates’ method of building an argument through gentle inquiries, [Franklin adopted] . . . the Socratic method.” *Id.* at 27. “Franklin would draw people into making concessions that would gradually prove whatever point he was trying to assert.” *Id.*; cf. *supra* note 18 on Socratic methodology.

<sup>56</sup> Leo Strauss says of Rousseau’s notion of the general will, for example, that “[t]he corrective to folly was to be found above all in the character of the laws as general both in origin and in content: all subject to the laws determine what all must or may not do.” STRAUSS, *supra* note 9, at 145. Thus “there is no longer a need *or a possibility* of appealing from positive law to natural right . . .”. *Id.* (emphasis added). This elision of natural law and positive law, on the mistaken basis that the conventions of democratic positive law are the closest possible approximation to natural law, is – just as happened – the precursor to the tyranny of the majority. “*The Social Contract* (1762) was the ‘Bible’ of the Terrorists during the Revolution.” OWEN CONNELLY, THE FRENCH REVOLUTION AND NAPOLEONIC ERA 25 (1979).

form of government – as merely instrumental, we understand how government can be evaluated in more fundamental terms than merely asking whether a law was enacted by a legislative majority or whether a government officer obeyed the positive law. In the next section, we examine how it may be possible to make such an evaluation.

### III. Pluralism and Conflicting Values

Professor Leo Strauss has noted that the generally-accepted notion that there can be such things as “unjust laws” is irreconcilable with relativism or legal positivism: “If there is no standard higher than the ideal of our society, we are utterly unable to take a critical distance from that ideal.”<sup>57</sup> To posit a standard “higher” or external to the positive law was the project of natural law – but is such a project possible if humankind does not have a single nature and purpose towards which human communities strive?<sup>58</sup> The concept of pluralism as articulated by Isaiah Berlin may provide the answer: if we understand the conflict of values according to his terms of *objective* pluralism rather than relativism, we are, so to speak, back in business.

Pluralism, as conceived by Isaiah Berlin, is neither relativism nor the abandonment of values:

There is a world of objective values. By this I mean those ends that men pursue for their own sakes, to which other things are means. I am not blind to what the Greeks valued – their values may not be mine, but I can

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<sup>57</sup> STRAUSS, *supra* note 15, at 3.

<sup>58</sup> “We are all in the grip of the same difficulty. Natural right in its classic form is connected with a teleological view of the universe.” *Id.* at 7.

grasp what it would be like to live by their light, I can admire and respect them, and even imagine myself pursuing them, although I do not – and do not wish to, and perhaps could not if I wished.<sup>59</sup>

Thus in a pluralistic society, the atheist and the theist can coexist because the limited purpose of government is to create the conditions for a wide range of human endeavors, rather not to enforce the agenda in furtherance of a single ideal.<sup>60</sup>

Pluralism does not simply amount to free speech in the discussion of how to implement public policy.<sup>61</sup> Rather, pluralism is “the conception that there are many different ends that men may seek and still be fully rational, fully men, capable of understanding each other.”<sup>62</sup> In our model of natural law reasoning, pluralism follows from the principle of equality and, in light of the limited purpose of government, allows for divergence of ideals. Thus pluralism accounts for diversity of opinion, while admitting the possibility of constructive civil discourse through tolerance and moral imagination.<sup>63</sup> Democratic

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<sup>59</sup> ISAIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY* 11 (Princeton Paperbacks 1990) (1959).

<sup>60</sup> Greater appreciation of this point would likely reduce the acrimony and vilification in mainstream political discourse, where the differences are less extreme. We may see people on the other side of the political aisle as more sincere and more logical if account for the possibility that our disagreements may derive from genuine philosophical differences.

<sup>61</sup> Free speech is, as the Athenians understood, an important component of democracy. OXFORD CLASSICAL DICTIONARY 451 (3rd ed. rev.) (2003) [hereinafter ‘OCD’]. Note well, however, that free speech can exist apart from democracy, as it did under the just Antonine emperors: “The times of the emperors from Nerva to Marcus Aurelius were the golden times when everyone could hold and defend any position he pleased: golden are the times when thought and expression of thought are not restricted by authority.” STRAUSS, *supra* note 9, at 220. A reasonable person – forced to choose – might conclude that her pursuit of happiness has better prospects in a pluralistic but undemocratic society, rather than a democratic but unpluralistic society.

<sup>62</sup> BERLIN, *supra* note 58, at 11.

<sup>63</sup> “Ends, moral principles, are many. But not infinitely many: they must be within the human horizon.” *Id.*

institutions and the rule of law, as we will next attempt to demonstrate, may be mediating mechanisms in this common enterprise.

#### A. Democracy and the rule of law

The balance of collective and individual or particular interests is the essence of constitutional government. In the discourse of nation building, the mantra has become the tandem of democracy and “rule of law.”<sup>64</sup> If democracy refers to government by majority rule, what then is this companion or complementary concept of “rule of law?” The presumptive meaning of the term and its contextual use imply that rule of law refers to civil order achieved through respect for common institutions and lawful resolution of disputes.<sup>65</sup> Legal institutions can provide peaceful resolution of disputes only when they enjoy sufficient respect for the legitimacy of their decisions.<sup>66</sup> Rule of law, this analysis concedes, is the necessary accompaniment to democracy in the construction of constitutional government and civil society.<sup>67</sup>

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<sup>64</sup> “Since today’s interventionists generally intervene in the name of global order and ‘the rule of law,’ they must consequently strive to build the rule of law in the societies in which they intervene, at risk of losing their own global credibility.” JANE STROMSETH ET AL., *CAN MIGHT MAKE RIGHTS?* 4 (2006). One might add, less cynically, that the interventionists may be sincere.

<sup>65</sup> “On the institutional level, the rule of law involves courts, legislatures, statutes, executive agencies, elections, a strong educational system, a free press, and independent nongovernmental organizations (NGOs) such as bar associations, civic associations, political parties, and the like.” *Id.* at 4.

<sup>66</sup> “On the cultural level, the rule of law requires human beings who are willing to give their labor and their loyalty to these institutions, eschewing self-help solutions and violence in favor of democratic and civil participation.” *Id.*

<sup>67</sup> Hence my free advice to nation-builders: less bureaucracy, more Cicero.



In the original paradigmatic democracy of ancient Athens, democracy reflected the rise of the *demos* (δῆμος) class, the mass of freeborn urban dwellers who served as rowers in the navy.<sup>68</sup> Before the advent of Athenian naval power, Greek warfare had been dominated by land battle between formations of heavily armored infantry called hoplites, who were rural freeholders with sufficient wealth to have purchased their own “panoply” – a term that in its origin meant a complete set of armor.<sup>69</sup> The rise of naval power meant that the landless urban class called the *demos* was relatively more important to the city-state and more entitled to respect and consideration.<sup>70</sup> This occurred, however, in the context of the peace and prosperity created by the rule of Pisistratus and his sons in the VI Century.<sup>71</sup> In this sense, in the original democracy, economic power preceded and created political power,<sup>72</sup> and rule of law preceded democracy.

Our stabilization efforts in Iraq and elsewhere may suffer from a fundamental misconception if democracy is understood as the purpose (end) rather than an instrumentality (means) in the creation of civil society. Moreover, political history suggests that rule of law

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<sup>68</sup> VICTOR DAVIS HANSON, *CARNAGE AND CULTURE* 57 (2001) (“Because Salamis was a victory of the poorer ‘naval crowd,’ not an infantry triumph of the small landowner, in the next century the influence of the Athenian landless oarsman would increase substantially.”); *see also* OCD, *supra* note 61, at 456 (“*demos* sometimes ‘the sovereign people,’ sometimes ‘the common people’”).

<sup>69</sup> PAUL CARTLEDGE, *THE SPARTANS* (2003) 67.

<sup>70</sup> VICTOR DAVIS HANSON, *A WAR LIKE NO OTHER* (2005) 143.

<sup>71</sup> JEREMY MCINERNEY, *Tyranny, in ANCIENT GREEK CIVILIZATION* (Teaching Co. 1998).

<sup>72</sup> “[T]here is a kind of simple equation of the Athenian power developing in the V Century, and that equation is quite simply this: Athens equals democracy; democracy equals naval power; naval power equals empire. Each of these elements contributes to the other and reinforces the other.” JEREMY MCINERNEY, *The Athenian Empire, in ANCIENT GREEK CIVILIZATION* (Teaching Co. 1998).



may be a necessary *precondition* of democracy, and more important *than* democracy in facilitating the attainment of civic goods and human happiness.

## B. Pluralism and utopian idealism

To illustrate the benefit of pluralistic government, we now consider its abrogation by idealists who purport to know how to perfect human communities. Plato, for example, would not have acceded to our proposed limitation on the possible scope of government, on the basis that apparent conflicts of values are merely misapprehension of those values. Even in the specific context of politics, Plato's Socrates posited that values do not conflict if they are properly understood: "I mean to begin," he states boldly, "with the assumption that our State, if rightly ordered, is perfect. ... And being perfect, is therefore wise *and* valiant *and* temperate *and* just."<sup>73</sup>

Modern critics have not failed to note that Plato's theory of the unity of all values has contributed to utopian and human-perfectibility schemes, with regrettable consequences.<sup>74</sup>

Karl Popper saw in Plato's theory of expertise in statecraft the kind of "immodest belief in one's superior intellectual gifts, the claim to be the initiated, to know with certainty, and with

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<sup>73</sup> PLATO, *supra* note 1, at 126 (emphasis added). "The notion of the perfect whole, the ultimate solution, in which all good things coexist, seems to me to be not merely unattainable – that is a truism – but conceptually incoherent." BERLIN, *supra* note 59, at 13. Note that the supposition that, as Berlin wrote, "the true answers, when found, must necessarily be compatible with one another and form a single whole" is *a priori*. *Id.* at 6. In contrast, our natural law model is indebted to Aristotle's *Analytica Posteriora*.

<sup>74</sup> Professor John Wild noted that Karl R. Popper, Warner Fite, and other XX Century antifascist political philosophers made a villain of Plato and "all agree that if Plato, if he were alive today, would take his stand with totalitarianism and dictatorship against the forces of 'liberalism,' 'progress,' and 'democracy.'" WILD, *supra* note 36, at 3.

authority” that characterized the murderous political cadres of the XX Century.<sup>75</sup> Our natural law model, having established that natural equality compels pluralism, enables us to identify the error of utopian political regimes: utopian idealists contravene pluralism by imposing on civil society by government power a singular understanding of human purpose.<sup>76</sup>

Indeed, the Nazis and the Taliban were nothing if not idealistic – notwithstanding the nightmarish quality of the ideals in which they believed and upon which they sought to organize and reorder their societies.<sup>77</sup> “The fascist movement, in the eyes of its more idealistic followers, was led by an heroic, dedicated, and disciplined elite ready to use any force needed to drive out the soft, comfort-seeking, and eternally compromising rulers of decadent Europe.”<sup>78</sup>

The National Socialists had sharply defined and proudly pronounced ideals, many of which had an aesthetic component or expression.<sup>79</sup> The Nazi ideal – not to say the ideal Nazi – was “blond, tall, long-skulled, with narrow faces, pronounced chins, narrow noses with a

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<sup>75</sup> *Id.* at 16, quoting KARL R. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 413 (1950).

<sup>76</sup> An important distinction is that the offending utopian idealists may or may not violate positive law or democratic method. By now it should be clear that my natural law model regards positive law and democracy as merely instrumentalities (means) rather than values (ends).

<sup>77</sup> “Some armed prophets seek to save mankind, and some only their own race because of its superior attributes, but whichever the motive, the millions slaughtered in war or revolutions – gas chambers, gulag, genocide... – are the price men must pay for the felicity of future generations.” BERLIN, *supra* note 59, at 11.

<sup>78</sup> JOHN WEISS, *THE FASCIST TRADITION* 29 (1967).

<sup>79</sup> In Adolf Hitler’s youth in Vienna, he read pamphlets on “Aryan” supremacy such as “Newsletters of the Blond Fighters for the Rights of Men.” JOACHIM FEST, *THE FACE OF THE THIRD REICH* 9 (Michael Bullock trans., Pantheon Books 1970) (1963).

high bridge, soft fair hair, widely spaced pale-coloured eyes, pinky-white skin colour.”<sup>80</sup> The Nazis purported to admire “health” and strength in the individual and in the state. Not coincidentally, Adolf Hitler was a vegetarian and vitamin supplement enthusiast and many of the Nazi leaders indulged in 1930s health fads like Alpine hiking and sunbathing; at the beginning of the XX Century, “[t]here were hundreds of racial institutes and racially oriented health-faddist clubs, as well as worshippers of allegedly ancient mystic and Nordic cults of clean-living savages, their vital fluids cleansed, fed on organic foods, and united with the holy Teutonic soil....”<sup>81</sup>

The Nazis had a vision of the perfect world, populated – exclusively – by their ideal type of people, and anyone incompatible or inconvenient would simply have to be removed at whatever cost. As Hitler pronounced, “Where we are, there is no place for anyone else.”<sup>82</sup> The dream of the Nazi regime was to establish an ideal German heartland of pure racial Aryans, with an eastern European frontier comprising “a vast network of governor’s palaces and model villages inhabited by the Nordic peasant and warrior aristocracy.”<sup>83</sup>

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<sup>80</sup> *Id.* at 99-100, in a chapter on Reinhard Heydrich, the so-called “Blond Beast.”

<sup>81</sup> WEISS, *supra* note 78, at 27-8. Here especially, Jean-Jacques Rousseau’s enormous presence – and culpability – intrudes, but to account for Rousseau and Nietzsche in these pages would exceed the scope of the project.

<sup>82</sup> *Id.* at 106. “The slaughter of the Jews, that is to say, was a social policy for the alleged improvement of German and European life, and it was an act of German society, not of a few isolated groups of corrupt sadists.” *Id.* at 107.

<sup>83</sup> *Id.* at 123.

Thus “idealism” is not the exclusive domain of utopian visionaries of the left. “The most unwelcome truth about the radical right may very well be that they are idealistic and even utopian social visionaries.”<sup>84</sup> And in the words of classical scholar Paul Cartledge, “Sparta was the original utopia (Thomas More, who coined the word Utopia in 1516, had Sparta very centrally in mind), but it was an authoritarian, hierarchical and repressive utopia, not a utopia of liberal creativity and free expression.”<sup>85</sup>

In fact, utopian idealism and human perfectibility schemes always have a dark side of intolerant perfectionism and contempt for human frailty.<sup>86</sup> From Robespierre to Lenin to Hitler to the Taliban, the radical reorganization of society to conform to a singular vision has a bloody and unsuccessful record. This will always be so. Isaiah Berlin’s book on European utopianism takes its title from an aphorism of Immanuel Kant: “Out of timber so crooked as that from which man is made nothing entirely straight can be built.”<sup>87</sup> The imperfect nature of humanity renders all utopian scheming inhumane. “A certain humility in these matters is very necessary.”<sup>88</sup>

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<sup>84</sup> *Id.* at 122.

<sup>85</sup> CARTLEDGE, *supra* note 69, at 24.

<sup>86</sup> “To force people into the neat uniforms demanded by dogmatically believed-in schemes is almost always the road to inhumanity.” BERLIN, *supra* note 59, at 19.

<sup>87</sup> *Id.*, epigraph.

<sup>88</sup> *Id.* at 18.



Moreover, it is important to understand that National Socialism was the extreme manifestation of German philosophical idealism.<sup>89</sup> If anyone still actually read Hegel and saw what a romantic racist<sup>90</sup> he was, people might be more reluctant to cite him so routinely, even in the sordid context of dialectical materialism. That perfectionist utopias are no place for actual human beings is evident even before the death camps are discovered. The many visitors to Ludwig “Schloss” Neuschwanstein should bear in mind that they are not touring a mediaeval fortress, but rather a romantically archaic, Wagnerian theatrical set<sup>91</sup> completed in 1886 – only three years before completion of the Eiffel Tower that they may have visited on the European vacation. Whenever I visited Neuschwanstein – and if you are stationed in Germany, you take guests there regularly – it struck me as the intolerant perfectionist precursor to the Nuremberg rallies and the death camps. Ludwig II bankrupted Bavaria to

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<sup>89</sup> In the introduction to *The Face of the Third Reich*, Joachim Fest remarks defensively, “The impression may be gained from many passages that we are dealing with a collection of typically German failures to meet the demands of history and politics.” FEST, *supra* note 79, at xiii. Indeed, that impression is unavoidable in the particular instance, though, as he rightly notes, others have and will fall prey to “blind hunger for the apparent certainties of a universal philosophy.” *Id.*

<sup>90</sup> “The German spirit is the spirit of the new world. Its aim is the realization of absolute truth as the unlimited self-determination of freedom – *that* freedom which has its own absolute form itself as its purport.” Thus opens “The German World,” the fourth part of Hegel’s *Philosophy of History* (following the Oriental World, the Greek World, and the Roman World; nothing of course follows the German World). If you think this paper is abstract, try reading Hegel. Georg W. F. Hegel, *Philosophy of History*, in 46 GREAT BOOKS OF THE WESTERN WORLD 153, 315 (J. Sibree trans., Mortimer J. Adler ed., 1952) (1831). Isaiah Berlin distinguishes Hegel’s progressivism from the universalism of Plato in that Hegel posited change (evolution, if you will) of humanity. BERLIN, *supra* note 59, at 6. In this sense also, Joachim Fest would distinguish ancient utopianism from modern totalitarianism: “Every totalitarian government starts from a new image of man; this, by definition, is what distinguishes it from the classical forms of coercive government.” FEST, *supra* note 78, at 292. This is a minute distinction in that utopianism, beginning with Plato, has always sought to make men virtuous by perfecting civic education and eliminating vice even at the cost of eliminating choice. These forms of utopianism are of a piece in their inhumane perfectionism.

<sup>91</sup> Compare the theatrical behavior of Hermann Goering on the world stage as second in command of Hitler’s Reich: “At a reception for the Diplomatic Corps in the Schorfheide, in the words of an eyewitness, ‘he wore a rust-brown jerkin and high green boots and carried a six-foot spear.’” FEST, *supra* note 79, at 78.

build his romantic castle and grotto, and Hitler immolated Germany in his effort to create an empire of supermen. Same inhumane perfectionism, more killing.<sup>92</sup>

Similarly, the Afghan Taliban sought to reform society in accordance with their particular vision of the ideal society, one which would conform in every respect to the letter and spirit of their interpretation of Islamic law. Opposing views were not entitled to tolerance, much less respect or accommodation. This policy was not in the strict sense irrational: logically, it is the appropriate conclusion following from the premise that a higher authority (in this case, God, as understood through the Taliban interpretation of the Quran) had decreed that opposing views were categorically wrong and ultimately harmful to the community and every individual. The problem lies in that premise, not in the logical implementation that led them to beat women in the street and execute people in soccer stadiums.<sup>93</sup> The Nazis and the Taliban began with the philosophic premise of denying the possibility of anyone else being right, and concluded, *logically*, with mass murder. Relativism, legal positivism, and democratic institutions (merely by existing) simply cannot do the work of refuting the agenda of intolerant perfectionists and utopian dreamers who acquire government power. Instead, we must understand and defend constitutional government by demonstrating that political pluralism derives from natural law reasoning. In the next section, we confirm that the conflict of values is not merely a challenge that past

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<sup>92</sup> Considering Hitler in relation to Ludwig II, I note Edmund Burke's remark on another political radical, quoting Juvenal, "I wish he had devoted to nonsense all the time he had to spare for violence." EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 96, 380n (Penguin 1986) (1790).

<sup>93</sup> "As for fascism's alleged 'irrationality,' it is, in reality, not so much a revolt against reason as a revolt against liberalism which liberals have found unreasonable." WEISS, *supra* note 78, at 10.

regimes have failed to overcome, but rather an impossibility as best we can discern from human experience.<sup>94</sup>

### C. Conflicting values in Greek tragedy

Plato's belief in the unity of values put him at odds with the great Athenian tragic poets of the V Century, who presented an image of life as struggle. Greek tragedy is famously associated with Aristotle's concept of the "tragic flaw"—a weakness or moral blindness that keeps the dramatic character from seeing the error in a course of action, with tragic results.<sup>95</sup> Interestingly, this is the word used in the Greek New Testament translated as "sin"<sup>96</sup> and may be understood as the tension internal to each character. Greek tragedy is the conflict of values both within the individual and in society.<sup>97</sup>

In Sophocles' *Antigone*, the titular character comes into conflict with the ruler of the city because she believes it is her duty to bury her dead brother Polyneices, whom the ruler has decreed may not be buried because he attempted to depose the ruler, who is also her uncle (named Creon). Antigone buries her brother, violating the ruler's decree, because she

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<sup>94</sup> See *supra* note 73.

<sup>95</sup> ELIZABETH VANDIVER, *Tragedy Defined*, in GREEK TRAGEDY (Teaching Co. 2000). "Values may easily clash within the breast of a single individual; and it does not follow that, if they do, some must be true and others false." BERLIN, *supra* note 59, at 12.

<sup>96</sup> "And forgive us our sins (ἁμαρτίας), for we ourselves forgive everyone indebted to us." [Luke xi:4.] WORD STUDY GREEK-ENGLISH NEW TESTAMENT 256 (Paul R. McReynolds ed., Tyndale House 1998) (late I Century).

<sup>97</sup> VANDIVER, *supra* note 95.

believes that the received tradition is a law of higher authority than the positive law promulgated by the city's ruler:

Creon: And did you dare to disobey that law?

Antigone: Yes, it was not Zeus that made the proclamation; nor did Justice, which lives with those below, enact such laws as that, for mankind. I did not believe your proclamation had such power to enable one who will someday die to override God's ordinances, unwritten and secure. They are not of today and yesterday; they live forever; none knows when first they were.<sup>98</sup>

Opposing this principle of individual duty, Creon stands for the collective duty and temporal authority: "There is nothing worse than disobedience to authority. It destroys cities, it demolishes homes; it breaks and routs one's allies. Of successful lives the most of them are saved by discipline."<sup>99</sup> He is better understood not as a "melodramatic tyrant" or monster, but rather as the voice of "the commonplace ideas of his day."<sup>100</sup>

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<sup>98</sup> SOPHOCLES, *supra* note 4, at 155-6. Professor Joseph Koterski used this passage in introducing the distinction between positive law and natural law in *NATURAL LAW AND HUMAN NATURE*, *supra* note 17. Leo Strauss noted, "The famous verses in Sophocles' *Antigone* (449-460) in which the heroine appeals from man-made law to a higher law do not necessarily point to a natural law; they may point to a law established by the gods or what one may call in later parlance a positive divine law." STRAUSS, *supra* note 9, at 137. Professor Strauss' point is supported by Antigone's statement that, "The god of death demands these rites for both [brothers]." SOPHOCLES, *supra* note 4, at 158. However, the greater weight of her reasoning sounds in natural law rather than divine will. She laments that "the evils due to enemies are headed towards those we love." *Id.* at 139. She reacts with a visceral, as it were, repugnance to Polyneices' fate, "unwept, unburied, a dainty treasure for the birds that see him, for their feast's delight." *Id.* at 140. And most compellingly, she explains that she would not defy Creon's order if Polyneices had been her husband. "If my husband were dead, I might have had another, and child from another man, if I lost the first. But when father and mother both were hidden in death no brother's life would bloom for me again. That is the law under which I gave you precedence." *Id.* at 172. If her motivation were principally divine command to bury the dead, such a command would apply to her husband as well as her brother – a distinction that she makes on the basis of the nature of the relationship, thus implicating natural rather than divine law.

<sup>99</sup> SOPHOCLES, *supra* note 4, at 164.

<sup>100</sup> Notes by James Hogan in SOPHOCLES, *supra* note 4, at 211. His description of Creon as "filled with the commonplace ideas of his day" brings to mind Polonius and his farewell speech to Laertes composed of generally sound conventional wisdom. WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 3.



Antigone is not only a more sympathetic figure than Creon, I fear that to the modern American audience, she is so much more sympathetic than Creon that dramatic tension is lost and Creon indeed becomes a cartoonish parody of an authoritarian ruler. The play's original context, however, was a city-state almost constantly at war – and at war in the most extreme sense of facing utter destruction if defeated. Athens had been evacuated in 480 B.C. in flight from a Persian invasion of Attica, and *Antigone* is believed to have been performed during the period between the two Peloponnesian Wars between Athens and Sparta.<sup>101</sup> To the original audience, Creon's arguments on behalf of discipline and security would surely have resonated more strongly than they do with a modern American audience.

Creon's position on the burial of the insurrectionist is harsh but not baseless. His rationale is to deter others from fomenting unrest and civil strife, so his purpose has social value and a justification other than spite or vindictiveness. The question is one of competing values: does the valid state interest in deterrence justify violating the social norm that calls for burial of the dead?<sup>102</sup> The conflict is not between good and evil, but between one value and another value in the conflict of irreconcilable moral duties.<sup>103</sup>

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<sup>101</sup> "The" Peloponnesian War took place (intermittently) between 431 and 404 B.C., but the so-called "first" Peloponnesian War took place between 461 and 446 B.C. VICTOR DAVIS HANSON, *supra* note 70, at 19.

<sup>102</sup> "While Antigone's words at one point do invoke a higher law (the divine command of kin to bury kin), there are ways in which [Creon's] commitment to the common good and the rule of law actually seem to me to be better based in natural law reasoning than her reasoning is." E-mail from Father Joseph W. Koterski, S.J., Associate Professor of Philosophy, Fordham University, to MAJ Christopher Carrier, Graduate Student, U.S. Army Legal Center and School (March 13, 2007, 18:07 EDT) (on file with author) [hereinafter Fr. Koterski e-mail].

<sup>103</sup> See ELIZABETH VANDIVER, *The Oresteia: Agamemnon, in GREEK TRAGEDY* (Teaching Co. 2000).

In fact, the resolution of the debate in favor of Antigone was somewhat subversive of civic order, though we should be cautious about projecting modern interpretations into the question of the author's message.<sup>104</sup> Although Antigone is the titular character, the play might be interpreted as being essentially about Creon,<sup>105</sup> and his pride and obstinacy. The prophet Teiresias advises Creon to be lenient, telling him, "It is obstinacy that convicts of folly," but Creon will not listen – until it is too late.<sup>106</sup> As mentioned above, the usual Greek term for law, *nomos* (νομος), applied to custom and precedent,<sup>107</sup> and Creon's substitute his own will in place of the received tradition would therefore be impious.

The Greek audience would have felt strongly that Antigone had a duty to obey Creon's decree.<sup>108</sup> The society of a city-state was more intimate and more coercive than we may imagine from our distant American perspective: even democratic Athens had communal religious festivals, cultural and religious uniformity, and an identity of state and society.<sup>109</sup> Consider also that Socrates was tried for impiety and accepted the judgment of the community. In the *Crito*, Plato's Socrates accepts his death sentence, asking, "Do you

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<sup>104</sup> "[Creon's] use of force is not arbitrary but legitimate as a tool of the rule of law. ... It is clearly force, not just violence, whereas Antigone's act is (as you suggest) 'subversive' of the civic order and the rule of law." Fr. Koterski e-mail, *supra* note 102.

<sup>105</sup> Professor Elizabeth Vandiver in a lecture on Antigone makes essentially this point, to the effect that Creon is the tragic hero or antihero who has a *hamartia*. ELIZABETH VANDIVER, *Antigone and Creon*, in GREEK TRAGEDY (Teaching Co. 2000). The political interpretation of this point is my own venture.

<sup>106</sup> SOPHOCLES, *supra* note 4, at 176.

<sup>107</sup> See *supra* note 21.

<sup>108</sup> VANDIVER, *supra* note 105.

<sup>109</sup> "Indeed, it was said that in Athens there was only one day left in the year without a festival, and that the festivals were cared for with even greater precision than the military campaigns." WALTER BURKERT, GREEK RELIGION (John Raffin trans., Harvard Univ. Press 1985) (1977) 256.

imagine that a state can subsist and not be overthrown, in which the decisions of law have no power, but are set aside and trampled upon by individuals?”<sup>110</sup> So Antigone does not merely face the challenge of being brave enough to follow legitimate authority and defy illegitimate authority; the law of the city is a legitimate authority, even if, as she argues, a lesser authority.

Moreover, Antigone’s refusal to obey Creon would have been seen as a dangerous usurpation of moral authority for any individual, and all the more for a young woman.<sup>111</sup> Antigone’s sister admonishes her, “You ought to realize we are only women, not meant in nature to fight against men...”<sup>112</sup> By challenging Creon’s authority, she wounds his pride and provokes him: “I swear I am no man and she the man,” he says, “if she can win this and not pay for it.”<sup>113</sup> Her belligerence in the face of civic authority almost forces Creon to reply in kind. When she is caught disobeying his order, she answers with defiance, and Creon responds, “I would have you know the most fanatic spirits fall most of all. It is the toughest iron, baked in the fire to hardness, you may see most shattered, twisted, shivered to fragments.”<sup>114</sup> Thus Antigone’s conduct is not conducive to compromise, and Creon is not totally at fault for the impasse. After her condemnation, the Chorus tells her, “There is a certain reverence for piety. But for him in authority, he cannot see that authority defied; it is

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<sup>110</sup> PLATO, *supra* note 8, at 308.

<sup>111</sup> VANDIVER, *supra* note 105.

<sup>112</sup> SOPHOCLES, *supra* note 4, at 141.

<sup>113</sup> *Id.* at 156.

<sup>114</sup> *Id.*

your own self-willed temper that has destroyed you.”<sup>115</sup> Modern scholars are unsure whether women even attended the tragic festivals in Athens, and we may surmise that Sophocles and his intended audience would have identified with Creon.<sup>116</sup> As citizens in a participatory democracy and as fathers in a paternalistic society, the male audience would have seen themselves authority figures, not as powerless young women.

To interpret *Antigone* as a conflict between Antigone and Creon, therefore, is largely to miss the point. The conflict is between the values, and each character fails to find a sound resolution. Antigone’s appeals to Creon are abrasive and hardly exhaustive, and Creon only considers only his angry desire to make an example of the traitor. Antigone’s valuation may have been correct, but her behavior was not entirely admirable and worthy of emulation. This interpretation emphasizes how the conflict in Greek tragedy was a conflict of cognizable values. Rather than good people struggling against wicked people (which seems to be the preferred pap in American entertainment), valid and compelling values vie for supremacy.

In Plato’s dialogues, in contrast, he sought to resolve all such conflicts and demonstrate that all values, if properly defined and understood, are reconcilable. This is a crucial difference between Plato and the Greek tragedians: where the tragedians presumed the conflict of values and used it as the basis of their art, Plato postulated that our imperfect

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<sup>115</sup> *Id.* at 170.

<sup>116</sup> JEREMY MCINERNEY, *Sophoclean Tragedy, in THE AGE OF PERICLES* (Teaching Co. 2004).



understanding of values caused us to believe, mistakenly, that the values conflict.<sup>117</sup>

Fortunately, we need not pronounce a final verdict on this supposition to benefit from the use of Plato's work as a critical apparatus in the examination of philosophical question, if we can avoid the conflict by agreeing on the value according to which value judgments will be made.

Plato's Socrates abjures a contextual conception of justice early in the *Republic*, when the young character Polemarchus offers and adopts the opinion of the lyric poet Simonides that justice consists in "giving to each man what is proper to him, and this he termed a debt."<sup>118</sup> Socrates attacks this proposed definition of justice with an argument that depends on his belief in the unity of the virtues, on the grounds that doing harm to one's enemies has the form of a debt, but cannot be good:

Then if a man says that justice consists in the repayment of debts, and that good is the debt which a just man owes to his friends, and evil the debt which he owes to his enemies,--to say this is not wise; for it is not true, if, as has been clearly shown, the injuring of another can be in no case just.<sup>119</sup>

This refutation of the proposed definition depends on the unity of values in the sense that Socrates' objection requires him to change the context, asking whether Polemarchus' definition of justice conflicts with his conclusion that doing harm to people is generally

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<sup>117</sup> This point is widely accepted and not my own observation; I recall having read or heard this point explicitly made, but cannot now find it in my texts and sources.

<sup>118</sup> PLATO, *supra* note 1, at 9. "[T]hat definition (giving to another what is due or fair) presumably is the real definition of justice (and thus the definition that Aristotle picks up and makes the center of Book V of the *Ethics*) . . . ." Fr. Koterski e-mail, *supra* note 102.

<sup>119</sup> PLATO, *supra* note 1, at 14.

wrong. That is only a valid objection if one presupposes the unity of values (specifically, benevolence and justice); within the context of justice, Polemarchus' definition is valid.

Socrates' objection is precisely that justice-as-debt is not universal and has no relevance to the skills of, he takes as examples, the musician and the soldier, and so "justice is not good for much."<sup>120</sup> Because this conception of justice amounts only to calculating our debts, it has no functional relationship with the performance of other arts: "justice is useful when they are useless, and useless when they are useful."<sup>121</sup> To Plato this is a major defect because he has presupposed the unity of values, but it presents no problem according to our basic model of natural law reasoning on the Aristotelian teleological basis that purpose determines quality.

Indeed, the project of this paper is to examine whether Plato's conception of justice may be profitable in the specific context of military justice. Plato's Socrates will offer that justice is indispensable to an art of great importance, the art of governing.<sup>122</sup> Because we can agree that justice is a valid criterion in the context of governing, we can make use of his discussion of justice without having to accept his contentions on the unity of values.

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<sup>120</sup> *Id.* at 11.

<sup>121</sup> *Id.* .

<sup>122</sup> *Id.* at 127.

#### IV. Single-Purpose Communities

Earlier sections of this paper have examined and illustrated the dangers of contravening the political pluralism compelled by the natural principle of human equality. Thus we approach Plato's *Republic* with caution, noting that his presupposition of the unity of values is anti-pluralistic, and so the logical result of its application to society at large would be to contravene pluralism. But would Plato's *Republic* not be relevant in the context of a segment of society that is not inherently pluralistic because it is specialized in its purpose? That is, supposing that a segment of society has a particular purpose, for that segment of society not to be pluralistic would not violate the principle of equality.

##### A. The armed forces as a single-purpose (or paramount-purpose) community

Unlike an open society as a whole, the armed forces of a state exist for an agreed-upon paramount purpose, the defense of the state. Therefore there is a teleological context in which essentially objective judgments are possible. The existence of purposes other than the paramount purpose deprive the paramount purpose of the status of being an absolute criterion, but for a single purpose to be paramount is qualitatively different than the condition of the civil society as a whole. A pacifist can be a citizen of the republic, but cannot be a military officer, because citizens in a democratic republic are free to determine their own hierarchy of values, even when those values conflict with the beliefs of the majority. In contrast, the military officer accepts a hierarchy of values – at least in the context of action.

As addressed below in the context of officer status, military rank in a republic is a public trust, one in which power and resources are held for particular and limited purposes. Constitutional authorities commission officers to command forces and disburse public money only in the interest of national security and in accordance with law. Military orders purport to further the interests of national security, and if an officer at some point finds her moral beliefs to be in conflict with lawful orders, her duty is to resign her commission and cease to act as a military officer. In the case of unlawful orders, her duty not to follow the orders is equally clear, at least theoretically.

The philosophical premises that make the compelling case for open societies simply do not pertain in the armed forces, where there exists (1) an agreed-upon paramount value of national security to which life and liberty are subordinated and (2) an agreed-upon external authority in the form of civilian control of the military. If these two characteristics pervaded the society at large, the result would be a warlike, insular, and authoritarian state. In a word, the result would be Sparta.

#### B. Sparta: a single-purpose state

The Spartan system of government, derived from the mythical lawgiver Lycurgus, is known to us largely from the writings of Athenians (like Thucydides, the Athenian general who wrote the principal account of the Peloponnesian War) and Plutarch,<sup>123</sup> who wrote much

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<sup>123</sup> PLUTARCH, 1 LIVES 52-80 (John Dryden trans. 1683, Modern Library Paperback Ed. 2001) (circa A.D. 110).



later in antiquity, but seems to have had sources available that have not survived for our use.<sup>124</sup>

Famously, Sparta was a city-state organized for war.<sup>125</sup> More accurately, it was a city-state organized for internal and external security. Internal security was a necessary fixation because the Spartan ruling class held in servitude an enormous population of neighboring subject people.<sup>126</sup> The ruling Spartan peers trained for war, requiring lower-caste yeoman (*perioikoi*)<sup>127</sup> and serfs (helots)<sup>128</sup> to perform all other arts, crafts, and agricultural labor. This exploitative system required an elaborate and vigilant state security system apart from offensive or defensive operations against foreign enemies.

The Spartan political system was utterly “conservative” in the sense of making change difficult. There were two kings simultaneously, an executive council of five ephors, and a senate of elders.<sup>129</sup> Decision making was ponderous – which is a virtue in the eyes of

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<sup>124</sup> Paul Cartledge, whose source skepticism I find oh-so-XIX Century, tellingly remarks that “Plutarch, the indefatigable researcher, cites no fewer than fifty previous writers in this one biography.... A modern historian would of course have given up at that point.” CARTLEDGE, *supra* note 69, at 61.

<sup>125</sup> On the distinction between free Athens and regimented Sparta, *see* PAUL CARTLEDGE, SPARTAN REFLECTIONS 80-3 (2001). Beginning at page 83, Cartledge then discusses the particulars of the Spartan educational regime.

<sup>126</sup> *See id.* at 88, for example, on the institution of the “Krypteia,” a secret service organized to intimidate the subject population.

<sup>127</sup> CARTLEDGE, *supra* note 69, at 73. Cartledge anglicizes *περιοικοι* as “peroeici” in the continuing British effort to confuse everyone with shifting conventions on the transliteration of ancient languages.

<sup>128</sup> *Id.* at 72 (“The name ‘Helots’ means ‘captives,’ and it was as the equivalent of war-captives that the Helots were subjugated and exploited by the Spartans.”).

<sup>129</sup> PLUTARCH, 1 LIVES 57 (John Dryden trans. 1683, Modern Library Paperback Ed. 2001) (circa A.D. 110). Our term “senate” comes from the Latin “senatus,” following from “senex,” meaning “old man.” The actual Spartan term, “gerousia” is akin to our word “geriatric.” CARTLEDGE, *supra* note 69, at 65-6.

people who valued loyalty and caution more than flexibility.<sup>130</sup> The Spartan system's lack of flexibility can be seen in its longevity and also in its refusal to take emergency measures in contravention of traditional practice even in dire circumstances. Faced with a Persian invasion in 480 B.C., the Spartans refused to commit their army to battle during the Karneia festival, agreeing only to send three hundred Spartan peers to the coalition force at Thermopylae.<sup>131</sup>

The Karneia are the most important annual festival of the Dorians, a festival which generally gives its name to a late summer month. The fact that war could not be waged during the period of the festival had serious consequences for the military actions of Argos and Sparta on a number of occasions, most notably during the Persian Wars: it was due to the Karneia that the Spartans arrived too late at the battle of Marathon and that Leonidas was sent to Thermopylae with an inadequate contingent.<sup>132</sup>

This kind of deference to received tradition,<sup>133</sup> together with the organization of the entire society in the interest of security, means that Sparta indeed had the characteristics that I have

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<sup>130</sup> See W.G. FORREST, *A HISTORY OF SPARTA* 30-60 (Norton 1969) (1968) for an admittedly unsympathetic account of the complexity of the Spartan constitution, interpreting even Spartan flexibility in battle order as the product of its "rigid uniformity."

<sup>131</sup> HERODOTUS, *THE HISTORIES* 409 (G.C. Macaulay trans. 1890, Barnes & Noble 2004) (circa 447 B.C.) ("[W]hen they had kept the festival, (for the festival of the Carneia stood in their way), they intended to leave a garrison in Sparta and to come to help in full force with speed....").

<sup>132</sup> See BURKERT, *supra* note 109, at 234; see *id.* at 256 re the status of religious festivals both in Athens and Sparta.

<sup>133</sup> *Id.* at 234 (internal citations omitted). "Carneia" is the Latinized form, following the custom of transliterating *καρπια* as "c." The term Dorian refers to the Greek dialect (and associated ethnicity) of the Spartans and their near neighbors. CARTLEDGE, *supra* note 68, at 58. Today's "hashers" might be surprised to learn of an ancient precedent in the foot race held by the Spartans as part of the Karneia festival: "what is unique about the Karneia race is that someone runs on ahead who is to be captured." BURKERT, *supra* note 108, at 235.

identified as distinguishing the armed forces in an open society. They are also qualities that made Sparta a formidable foe, whose strength Plato admired.<sup>134</sup>

Sparta, as the leading city in coalition with Corinth and Thebes, defeated Athens, sailing into the Athenian port at Piraeus and demolishing the Athenian “long walls” around the city and the port in 404 B.C.,<sup>135</sup> when Plato was approximately twenty-four years old.<sup>136</sup> The trial and death sentence of Plato’s teacher Socrates was directly related to the defeat and the subsequent political turmoil. As I have mentioned in connection with the socio-political context of Sophocles’ *Antigone*, security and political independence were more real and immediate concerns to V Century Athenians than to relatively secure XXI Century Americans.

Students of later political philosophy will recall that Thomas Hobbes praised the virtues of state power in response to the bitter suffering of the English Civil War. He advocated cession of power to the state in light of the alternative war of all against all, in which life is “solitary, poor, nasty, brutish, and short.”<sup>137</sup> Similarly, Plato’s experience of civil war offers us a ready and compelling explanation for his emphasis on security.

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<sup>134</sup> In Book VIII, Plato names Sparta for the first time, as an example of a society motivated by love of honor. PLATO, *supra* note 1, at 258. Certainly, however, his Hellenic audience could not have failed to note correspondences between his hypothetical city and the Spartan system. See SCHOFIELD, *supra* note 29, at 40.

<sup>135</sup> DONALD KAGAN, *THE FALL OF THE ATHENIAN EMPIRE* 411-2 (Cornell Paperbacks 1991) (1987).

<sup>136</sup> PLATO, *supra* note 1, at xi.

<sup>137</sup> Hobbes described the state of man without government, “where every man is enemy to every man,” and where there would be “no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.” Thomas Hobbes, *Leviathan*, in 23 GREAT BOOKS OF THE WESTERN WORLD 39, 85 (Mortimer J. Adler ed., 1952) (1666).

Plato's Socrates initially posits in the Republic that war might not be necessary in a strictly rational state in which people have few needs.<sup>138</sup> The desire for luxuries and extras<sup>139</sup> leads to increased social complexity,<sup>140</sup> he insists. But Glaucon pronounces that the barebones city would not be suitable for human beings, and Socrates concedes that "many will not be satisfied with the simpler way of life."<sup>141</sup> Here we can see his meaning more fully by incorporating our earlier consideration of Aristotle's conception of happiness as the fulfillment of human nature.

Also, the question of whether to take seriously Socrates' initial proposal of a just city as barrenly ascetic reintroduces the point that social visionaries may posit "ideal" societies that are unrealistic in the sense that they do not respond to basic human needs. Whether posited by Plato's Socrates for serious consideration or only for contradistinction, the barebones city of ascetics is quickly put aside in favor of a fuller vision of civic life – and Socrates immediately opines that under these more realistic conditions, the threat of war is a constant reality:

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<sup>138</sup> *Id.* at 56.

<sup>139</sup> *Id.* at 58 ("They will be for adding sofas, and tables, and other furniture; also dainties, and perfumes, and incense, and courtesans, and cakes, all these not of one sort only, but in every variety; we must go beyond the necessities of which I was at first speaking, such as houses, and clothes, and shoes: the arts of the painter and the embroiderer will have to be set in motion, and gold and ivory and all sorts of materials must be procured.").

<sup>140</sup> *Id.* ("Then we must enlarge our borders; for the original healthy State is no longer sufficient. Now will the city have to fill and swell with a multitude of callings which are not required by any natural want...").

<sup>141</sup> *Id.* at 57.



Then a slice of our neighbours' land will be wanted by us for pasture and tillage, and they will want a slice of ours, if, like ourselves, they exceed the limit of necessity, and give themselves up to the unlimited accumulation of wealth?

That, Socrates, will be inevitable.

And so we shall go to war, Glaucon. Shall we not?

Most certainly, he replied.<sup>142</sup>

In light of the Athenian experience in Plato's lifetime, we can hardly be surprised by his pessimistic conclusion that rivalry and competition for resources are the constant and adequate preconditions for war, nor should we be surprised that he proposes examining and possibly emulating the Spartan system of government and education:

Despite its ultimate failure, catastrophe and collapse in real-power terms, Sparta's hold over non-Spartan Greek and foreign imaginations grew, and continues today to grow, ever stronger and more complicated. It began with Socrates' pupils Critias and Plato (a relative of Critias) in the late fifth and fourth century BC and has continued almost without a pause....<sup>143</sup>

Whatever the flaws in the Spartan system, its victory in the Peloponnesian War entitled it to some measure of respect.

Indeed, Plato's Socrates insists that the citizen-soldier must be inferior to professional soldiers in line with the Spartan model:

Now nothing can be more important than that the work of a soldier should be well done. But is war an art so easily acquired that a man may be a warrior who is also a husbandman, or shoemaker, or other artisan; although no one in the world would be a good dice or draught player who

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<sup>142</sup> *Id.* at 58.

<sup>143</sup> CARTLEDGE, *supra* note 69, at 24.

merely took up the game as a recreation, and had not from his earliest years devoted himself to this and nothing else?<sup>144</sup>

This illustrates how, because Plato's democratic Athens had been defeated by Sparta, he was willing in the aftermath to question democracy itself and to consider social measures intended to increase civic unity. Plato's proposal to censor dissident poets,<sup>145</sup> for example, is more understandable if we consider that their divisiveness might have contributed to Athens' defeat, in consequence of which the democracy itself was overthrown.

Rather than dispense with pluralism entirely, however, a free and open society may instead create a segment of society dedicated to the defense of the state, which segment of the society would have the agreed-upon purpose of state security, to which other values are subordinated. This is an important distinction in understanding the purpose of – and therefore the suitable structure of – institutions; the legal institutions of the specialized segment of society should be expected to reflect that segment's specialized purpose, rather than the pluralism that obtains in the society at large. In the following section of the paper, we will see that court-martial panels differ from civilian juries, not for reasons that are arbitrary and unjustified, but rather because the court-martial panel reflects the nature of the armed forces as a specialized segment of society, in which a guardian class holds authority and responsibility.

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<sup>144</sup> PLATO, *supra* note 1, at 59.

<sup>145</sup> *Id.* at 63. ("Then the first thing will be to establish a censorship of the writers of fiction, and let the censors receive any tale of fiction which is good, and reject the bad; and we will desire mothers and nurses to tell their children the authorized ones only. Let them fashion the mind with such tales, even more fondly than they mould the body with their hands; but most of those which are now in use must be discarded.")

## V. Panel Composition and Military Justice

A key distinction between the American armed forces and American society as a whole is that, whatever may be said of disparities in wealth and income, there are no *formal* divisions of class in the society. The Constitution of 1787 expressly barred titles of nobility,<sup>146</sup> and perhaps more importantly, George Washington acted to prevent his Revolutionary War officers from establishing themselves as a hereditary American aristocracy, when, in 1786, he eviscerated the officer alumni association, the classically-named “Society of the Cincinnati,” by pointedly refusing to attend its second convention when it became clear that its organizers intended to combine hereditary membership and political aspirations.<sup>147</sup> General Washington’s salutary precedents are so numerous that they become obscured, but his role in this derailment of the possibility of an hereditary American aristocracy deserves to be remembered.<sup>148</sup>

Some early Americans may have wished to imitate the British model of an officer aristocracy in its tone or formal structure, but the raw character of American society militated against the kind of snobbery in the colonial rank structure that had kept a young George Washington from obtaining a commission in the British army.<sup>149</sup> The British army of the late XVIII Century reflected Britain’s highly stratified formal and informal class consciousness.

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<sup>146</sup> U.S. CONST., art. I, §9, clause 8.

<sup>147</sup> JAMES THOMAS FLEXNER, *WASHINGTON: THE INDISPENSABLE MAN* 201 (Back Bay Books 1974) (1969).

<sup>148</sup> In the more famous matter of Washington’s refusal of a coup in 1782, few accounts do him the full justice of noting that his letter of reply insisted that the conspirators had insulted him. “I am much at a loss to conceive what part of my conduct could have given encouragement . . . .” *MAXIMS OF GEORGE WASHINGTON* (1989) 19.

<sup>149</sup> FLEXNER, *supra* note 147, at 18.

The British military historian Byron Farwell assures us that “[f]rom 1660 [that is, after the English Civil War] until the First World War the British army was led by gentlemen.”<sup>150</sup> British aristocrats gave only grudging admiration to the victories of Oliver Cromwell’s New Model Army, which was “partly the envy and partly the scorn of the nobility.”<sup>151</sup> Most Americans would agree with Cromwell’s famous dictum that “I had rather have a plain russet-coated captain that knows what he fights for and loves what he knows than what you call a gentleman and is nothing else. I honour a gentleman that is so indeed.”<sup>152</sup> In Byron Farwell’s description of the class system in the British military, he noted that utterance but explained, “That was a point of view that died with him.”<sup>153</sup> Mr. Farwell might well have added the words, “in Britain.” In America, aristocrats were in short supply – if sufficient for demand – and officers continued to be mostly “such as have filled dung carts both before they were captains and since,” as a British snob scoffed about the (victorious) Parliamentary army.<sup>154</sup> From necessity and conviction, the American attitude about the officer class has lacked British rigidity and instead been based in merit.

Notwithstanding this difference, the American military system differs from American society generally by having a formal class system. For an officer to fraternize with enlisted

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<sup>150</sup> BYRON FARWELL, *MR. KIPLING’S ARMY* 70 (Norton paperback 1987) (1981). We may reasonably infer that he dates this distinction as beginning in 1660 because the aristocratic monopoly on the profession of arms was interrupted by the English Civil Wars.

<sup>151</sup> CHRISTOPHER HILL, *GOD’S ENGLISHMAN: OLIVER CROMWELL AND THE ENGLISH REVOLUTION* 74 (Harper Torchbook 1970) (1972), quoting Rev. Richard Baxter (a parliamentary leader).

<sup>152</sup> *Id.* at 67.

<sup>153</sup> FARWELL, *supra* note 150, at 70.

<sup>154</sup> HILL, *supra* note 151, at 66.



members is a criminal offense,<sup>155</sup> and although officers or enlisted may be prosecuted for behaving in a way that discredits the service,<sup>156</sup> only officers can be guilty of conduct “unbecoming an officer and a gentleman” because officers have a heightened status that must not be compromised.<sup>157</sup> This may be construed not merely as a vague romantic notion, but rather as part and parcel of the fiduciary duty of an armed forces officer.

A Department of Defense pamphlet titled *The Armed Forces Officer* (the first version of which was written by Brigadier General S. L. A. Marshall and promulgated by Secretary of Defense George C. Marshall in 1950) acknowledges the nature of officer status as a hybrid of archaic aristocratic notions and American meritocracy:

... the concept of military officers is based on the notion of “gentlemen,” who, by definition, possess the ideal qualities for military leadership. Many Western societies have operated governments and armed forces on the assumption that that the accident of birth presupposed the ability to lead nations and armies. ... America quickly discarded the flawed system of selling commissions. Allowing troops to elect officers worked only marginally better. We rapidly began to define leadership in terms of inherent qualities and teachable skills, based on the person rather than the accident of birth.<sup>158</sup>

Thus the American military officer receives special trust and confidence as an achievement of merit rather than a right of birth.

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<sup>155</sup> MCM pt. IV, ¶ 83.

<sup>156</sup> UCMJ art. 134.

<sup>157</sup> UCMJ art. 133.

<sup>158</sup> DEP’T OF DEFENSE, *THE ARMED FORCES OFFICER*, DOD GEN-36A 4 (1988).

Notably, Plato's *Republic* prefigured this rejection of hereditary nobility in assigning class status. Using an analogy based on the relative values of metals, he proposed,

[I]f the son of a golden [ruling class] or silver [fighting class] parent has an admixture of brass and iron, then nature orders a transposition of ranks, and the eye of the ruler must not be pitiful towards the child because he has to descend in the scale and become a husbandman or artisan, just as there may be sons of artisans who having an admixture of gold or silver in them are raised to honour, and become guardians [rulers] or auxiliaries [soldiers].<sup>159</sup>

Thus membership in Plato's guardian class, as in ours, is intended to be meritocratic, but this parallel helps to illustrate that it is a class distinction, as opposed to an individual office. Our "classless" society has chosen to perpetuate a bifurcated military rank structure, in which all commissioned officers outrank all enlisted members, and a major with ten years of service is paid more than a sergeant major with twenty-six years of service.<sup>160</sup> Rather than a single track of gradations from private to general, we retain the distinction between officer and enlisted, and the participants in military culture do not view the distinction as an antiquated vestige. As we will see in the next section, officers as a class predominate in the composition of court-martial panels, which panels are themselves selected meritocratically.

#### A. The court-martial panel

Noting that the civilian jury and the court-martial panel both are deliberative triers of fact, one may simply assume that the court-martial panel is simply the military version of the

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<sup>159</sup> PLATO, *supra* note 1, at 112-3.

<sup>160</sup> Defense Finance and Accounting Service pay tables, available at <http://www.dod.mil/dfas/militarypay/newinformation/WebPayTableVersion2006updated.pdf> (last visited, March 26, 2007).

civilian institution, the jury of one's peers. In the modern military justice system, they perform a substantially similar function, as finder of fact (as opposed to determining questions of law, which is the province of the judge in both military and civilian courts). In fact, the military panel – which historically functioned without a military judge – has a parallel history as a military tradition and is not simply a recent addition in mimicry of civilian practice.

### *1. The separate military tradition*

In the Roman Army, military justice was often summary.<sup>161</sup> “Any praetorian or legionary accused of a crime was judged at the camp by his superiors (tribune for the investigation, prefect or legate for the judgement) under an accelerated procedure.”<sup>162</sup> Modern readers who read that justice was in the hands of “magistrates” must remember that that term and its Latin antecedent refers to holders of executive offices<sup>163</sup> – not to those performing the “neutral and detached” review of executive decisions, which is how the term is used in modern English, including in the U.S. military.<sup>164</sup> The only appeal available in Roman military justice was appeal to a higher level of command.<sup>165</sup>

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<sup>161</sup> “During that time [of enlistment], they were subject to an extremely harsh system of discipline, both corporal and capital punishment being imposed almost at the whim of their commanders.” ADRIAN GOLDSWORTHY, *THE COMPLETE ROMAN ARMY* 77 (2003).

<sup>162</sup> YANN LE BOHEC, *THE IMPERIAL ROMAN ARMY 220-1* (Raphael Bate trans. 1994, Routledge 2000) (1989).

<sup>163</sup> OCD, *supra* note 61, at 911.

<sup>164</sup> A post akin to provost marshal was the *stator*: “The *stator*, not to be confused with *strator*, arrested and condemned soldiers guilty of minor offenses.” LE BOHEC, *supra* note 162, at 56.

<sup>165</sup> “The death penalty probably required the sanction of more senior [than Centurion] officers, but was inflicted for a range of offenses.” GOLDSWORTHY, *supra* note 161, at 101.

In the European military tradition that succeeded Rome and gave rise to the American military tradition, the court-martial was a board of officers and not a jury of peers. Major Christopher Behan, in a 2003 article in the *Military Law Review*, traced the lineage through the Mutiny Act of 1689 to the Articles of War of 1765, which we inherited, showing that court-martials composed of superior officers have a separate history from the institution of the civilian jury of peers.<sup>166</sup>

The Constitution provides that Congress shall have the power to make rules for the government and regulation of the land and naval forces.<sup>167</sup> Pursuant to this authority, Congress has established a system of justice within the province of military commanders, currently embodied in the Uniform Code of Military Justice (UCMJ).<sup>168</sup> Although entitled to equal protection of law under the due process clause of the Fifth Amendment,<sup>169</sup> a service member does not have a Sixth Amendment right to trial by jury.<sup>170</sup> Instead, military commanders appoint the members of courts-martial,<sup>171</sup> who decide not only guilt but also

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<sup>166</sup> Christopher W. Behan, *Don't Tug on Superman's Cape*, 176 MIL. L. REV. 190, 202-209 (2003). As MAJ Behan's article is a legal defense rather than a philosophical defense of court-martial composition, he rightly stresses the separate historical and legal foundations of the court-martial, to preclude his muddleheaded opponents from "loosely interchang[ing] the nomenclature of the jury and the court-martial panel." *Id.* at 243.

<sup>167</sup> U.S. CONST., art. I, §8, clause 14.

<sup>168</sup> 10 U.S.C. §§ 801 *et seq.* (2005), hereinafter cited as UCMJ art. 1 *et seq.* (2005).

<sup>169</sup> *See Frontiero v. Richardson*, 411 U.S. 677, 680 (1973).

<sup>170</sup> *United States v. Leonard*, 63 M.J. 398, 399 (2006).

<sup>171</sup> UCMJ art. 25.



sentence,<sup>172</sup> in a system with few mandatory minimum sentences.<sup>173</sup> The military commander who convenes a court-martial – the “convening authority” – personally chooses on an individual basis for court-martial duty “such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.”<sup>174</sup>

## *2. Court-martial panel selection criteria*

Article 25 does not begin, however, with these criteria of merit. Article 25(a) provides that any commissioned officer on active duty may sit on any court-martial, and Article 25(b) provides that any warrant officer may sit on any court-martial for a person other than a commissioned officer. Only at Article 25(c) do we see that enlisted persons may sit on the court-martial panel of an enlisted member if an accused on trial makes a specific request – in which case, enlisted members must constitute “at least one-third of the total membership of the court.”<sup>175</sup> In the structure of Article 25, taxonomy by rank precedes the analysis of individual merit.

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<sup>172</sup> UCMJ arts. 51 and 52.

<sup>173</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 118e(1) (2005).

<sup>174</sup> UCMJ art. 25 (d)(2).

<sup>175</sup> UCMJ art. 25(c)(1).

Although military rank is not a selection criterion listed in Article 25(d)(2), the default setting for court-martial membership is officers only.<sup>176</sup> Moreover, “[w]hen it can be avoided,” no court-martial member sitting in judgment of a particular case may be junior in rank to the person on trial.<sup>177</sup> The merit selection criteria of Article 25(d)(2) apply within the context of a system of rank.

Here is a system of criminal justice that seemingly admits the class-bias accusation of radical deconstructionist Michel Foucault’s critique that criminal law operates merely to protect property, and therefore the interests of an empowered class against the disruption and rancor of poorer classes:

[T]his being the case, it would be hypocritical or naïve to believe that the law was made for all in the name of all; that it would be more prudent to recognize that it was made for the few and that is was brought to bear upon others; . . . that in the courts society as a whole does not judge one of its members, but that a social category with an interest in order judges another that is dedicated to disorder . . . .<sup>178</sup>

Without conceding Foucault’s characterization of poorer classes as “dedicated” to disorder, we may concede that the Marxist interpretation is not always completely wrong: the wealthy indeed have more interest in the enforcement of property laws. In a similar crude sense, a military officer benefits more immediately from enforcement of subordination than does the subordinate.

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<sup>176</sup> See *United States v. Alexander*, 61 M.J. 266 (2005).

<sup>177</sup> UCMJ art. 25(d)(1).

<sup>178</sup> MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 276 (Alan Sheridan trans., Vintage Books 1995) (1975).

Another factor illustrating that the court-martial panel is an exercise of elite power is that Article 52 provides that conviction in non-capital cases, and sentences of up to ten years, may be adjudged “by the concurrence of two-thirds of the members,” so that a united front of officer members may overrule the objections of the one-third enlisted members provided by Article 25(d)(2).<sup>179</sup> In this sense, courts-martial can reasonably be characterized, admittedly, as a system in which officers as a class sit in judgment of criminal cases in which the accused may be members of the enlisted class.

#### B. The democratic jury

The court-martial panel, then, has always been composed of persons superior in rank and station to the person being tried. Court-martial panels were officers detailed to handle a matter on behalf of a commander. In contrast, the civilian jury has traditionally been composed of peers of the person being tried. This is the language of the VI Amendment and it can be traced to the paradigm of Western democracy, V Century Athens.

In the Athenian democracy, juries included hundreds of members.<sup>180</sup> Prosecution was generally by aggrieved private parties, and prosecutors and defense lawyers were public speakers in the sense that they addressed large crowds rather than the intimate numbers of

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<sup>179</sup> UCMJ art. 52(a)(2) and (b)(3).

<sup>180</sup> Sterling Dow, *Aristotle, the Kleroteria, and the Courts*, in *ATHENIAN DEMOCRACY* 62, 62 (P.J. Rhodes ed., 2004); see also OCD, *supra* note 60, at 452.

today's juries of twelve or fewer voting members.<sup>181</sup> Surviving accounts of arguments suggest that the rules of evidence were expansive and character evidence played an important role.<sup>182</sup> Large Athenian juries, assigned individually by lot, were intended to make bribery impossible – or at least prohibitively expensive.<sup>183</sup> Jury service was open to citizens and there was a stipend that made jury service attractive to the elderly and seasonal workers.<sup>184</sup> By today's standards, citizenship was severely limited and in that sense, undemocratic, but to the Athenian mind, the jury was a democratic institution, meaning that the bulk of the citizenry – not just the wealthy elite – were empowered to make decisions.

Our modern American democracy has made a similar judgment,<sup>185</sup> and our Supreme Court has held that “[t]he American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.”<sup>186</sup> The logic of our earlier argument that the natural principle of equality necessitates political pluralism fully supports the conclusion of our high court that jury service is a matter of general competency:

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<sup>181</sup> “Recent criticism has emphasized the ideological content and didactic function of 5th-cent. tragedy, linking it as a form of public discourse with debates and decision-making in the assembly (*ekklesia*) and with the speeches aimed at popular juries in the law courts.” OCD, *supra* note 60, at 1541 (internal citation omitted).

<sup>182</sup> JEREMY MCINERNEY, *Athenian Courts and Justice, in THE AGE OF PERICLES* (Teaching Co. 2004).

<sup>183</sup> Dow, *supra* note 180, at 62. The *kleroteria* was a device for random assignment of jurors to cases. *Id.* at 64.

<sup>184</sup> M. M. Markle, *Jury Pay and Assembly Pay at Athens, in ATHENIAN DEMOCRACY* 95, 96 (P.J. Rhodes ed., 2004); *see also* OCD, *supra* note 61, at 452.

<sup>185</sup> At this juncture, it may be worthwhile to reiterate the interplay of philosophical inquiry and positive law: Our philosophical inquiry may lead us to agree with legal conclusions derived from different bases, and the congruence or lack of congruence between positive law and our philosophical inquiry does not *itself* confirm or invalidate the philosophical inquiry.

<sup>186</sup> *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946), *citing* *Smith v. Texas*, 311 U.S. 128, 130.



This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. *Jury competence is an individual rather than a group or class matter.* That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to *the democratic ideals of trial by jury.*<sup>187</sup>

That is, our society has rejected the proposition that governing is a special skill to be exercised by a select class of people. Similarly, in *Ballard et al. v. United States*, the Supreme Court reversed – on principle, not on the basis of any showing of prejudice – a criminal conviction found by a jury from which women had been excluded.<sup>188</sup> Mr. Justice Bryer’s concurring opinion in *Miller-El v. Dretke*,<sup>189</sup> a case regarding racial exclusion, quoted Alexis de Toqueville’s view that the jury as an institution “raises the people . . . to the bench of judicial authority [and] invests [them] with the direction of society.”<sup>190</sup>

In an open society, there is a plurality of legitimate interests and discordant opinions.

The principle of fundamental human equality means that people are free to have disparate

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<sup>187</sup> *Id.* (emphasis added). In this case, a civil judgment was reversed because of economic class discrimination in the selection of jurors. “Wage earners, including those who are paid by the day, constitute a very substantial portion of the community, a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system.” *Id.* at 223 (internal note omitted).

<sup>188</sup> 329 U.S. 187 (1946). “The injury is not limited to the defendant -- there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.” *Id.* at 195. This rationale prefigures the position that the individual defendant may object to jury composition on behalf of the public. *Batson v. Kentucky*, 476 U.S. 79, 94 (1986); *Powers v. Ohio*, 499 U.S. 400, 422-3 (1991).

<sup>189</sup> 545 U.S. 231 (2005).

<sup>190</sup> *Id.* at 272-3, citing 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 287 (H. Reeve trans., 1900).

views on the relative importance of competing and contrasting values. As citizens, we are not legally or morally required to agree with each other on, for instance, whether security is a more important value than freedom. Most people will agree that security and freedom are both public goods, but some will value security even when it infringes on freedom, and others will favor freedom to the detriment of security.

Moreover, even among people who purport to agree on the ranking of principles in theory, the application in any particular instance of public policy may require balancing of interests in which people disagree. To ban smoking entirely or to lower the speed limit drastically, for example, might be objectively in the interest of public safety and save lives, yet many public safety advocates would make allowance for competing interests at the expense of public safety. Similarly, even self-described “libertarians” usually make some concessions to safety and security concerns in the formulation of public policy.

This plurality of values and value judgments is one of the philosophical underpinnings of democratic government, which at its best seeks to balance contrasting views and to allow dissenters to express their views and even to live in accordance with divergent principles as long as they do not harm the public good. Just as the Athenians believed, it operates in miniature in a jury composed of citizen peers.

The court-martial panel is a different undertaking based on different principles. The armed forces are not a democracy because in their function as the armed forces, there is no legitimate plurality of conflicting values: the paramount purpose of the armed forces is the

defense of the nation in accordance with law established by civilian authority. At this junction, note three points that will be developed below with the aid of Plato's *Republic*:

(1) Unlike American society, which is or aspires to be open and pluralistic, the armed forces have a paramount guiding principle that cannot reasonably be disputed. The paramount purpose for the existence of the armed forces, i.e., preparation for and execution of military operations for national defense, does not exclude all other values, but it does subordinate them. Human life is a Western value of the highest order, but in the context of the armed forces, it is subordinated to national security.

(2) Because the armed forces have a determinable hierarchy of values topped by national security, democracy is not philosophically necessary as an instrumentality to protect pluralism. In an open society, one person or group has no inherent right to impose its values on others; law in an open society reflects efforts to achieve civic goods rather than normative impositions. This latter point is understood, at least intuitively, by free speech advocates and opponents of "thought crimes" who rightly distinguish between wrong acts (which may reasonably be criminalized) and "wrong" ideas (which should be opposed with counterarguments rather than suppression). Generally, the public is not scandalized by the absence of democracy in the armed forces, possibly because people also intuitively realize that the armed forces have a unity of mission that is necessarily absent from civilian society.

(3) In the particularized context of military culture, even in a secular republic, there is a source of authority for which there is no equivalent in a democratic civilian society.

Leaders in the armed forces issue orders, but they do not make law. A democratic society makes its own law, and holds the power of altering its constitution if it sees fit. Democracy is majority rule, and constitutional government consists largely of the sorely vexed questions of minority rights in the context of majority rule. In contrast, the armed forces, being a part of the civic whole and subordinated to the civic whole, enjoy (if that is the right word) the functional simplicity (from a philosophical standpoint) of operating within a legal framework created by higher authority. In practice, this subordination may actually impede mission accomplishment, but in theory, it greatly simplifies moral reasoning – if one accepts as valid the premise that the armed forces must be subordinated to civilian authority, and on this point there is wide agreement.

We see, then, that the court-martial panel is not a shabby and bastardized version of a civilian jury of peers. The court-martial panel is not a recent invention in mimicry of the jury of peers, and conceptually, it functions in a different context. The civilian jury is itself a democratic institution in a pluralistic context, whereas the military court-martial panel is an office – a magistracy in the Roman sense – performed by selected people in a particularized context. The civilian jury member is a citizen acting as a citizen under her own civic authority, but the court-martial panel member performs a duty in a hierarchical system.

#### VI. Plato's question: What is justice?

At this juncture, having accepted that the armed forces are a specialized segment of society, in which a hierarchy of values obtains, the possibility opens that Plato's anti-



pluralistic model may be relevant and helpful within this context. We are able, that is, to use the *Republic's* discussion of justice as a critical apparatus without adopting or refuting Plato's unity of values. In the wider political context of the state, which we wish to be an open society, we have rejected the unity of values as insufficiently knowable to provide a ruling party the moral authority to impose its will. In the narrower context of the armed forces, however, Plato's theory of justice can operate to reconcile conflict on the less grand, merely functional basis of a hierarchy of values, regardless whether conflicting values are ultimately reconcilable in a manner beyond human comprehension. This functional substitution is highly expedient for our purposes – and probably valid.

According to Plato, to assess the common good is a *techne* (τεχνη), or skill, in the sense of a craft performed by artisans, or, in an extended analogy, piloting a ship.<sup>191</sup> The purpose, according to Plato's Socrates, is in the art and not in the benefit to the artisan: "[N]o physician, in so far as he is a physician, considers his own good in what he prescribes, but the good of his patient; for the true physician is also a ruler having the human body as a subject, and is not a mere money-maker."<sup>192</sup> That is, the skilled artisan creates a good suitable for its intended purpose, and the just ruler makes decisions that contribute to the common good. Justice is the governing principle by which the governing class uses its intelligence. In Plato's view, intelligence employed unjustly – engaging in sophistry for profit, for example – is not wisdom, but mere cleverness.

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<sup>191</sup> PLATO, *supra* note 1, at 195.

<sup>192</sup> PLATO, *supra* note 1, at 22.

Within Plato's city, the ruling class are not alone in being guided by justice to act according to their purpose. Plato posits that the fighting class, characterized by "spirit,"<sup>193</sup> must channel their spirit in accordance with the demands of justice, and that the governed class must control their appetites in accord with justice. Each class has its role and consequent demands upon it, and justice is the sense of duty to the common good that informs the performance of those roles.

One should be skeptical of convenient and superficial correspondences, but it easily occurs to a military officer to note that the armed forces have three basic classes (commissioned officers, noncommissioned officers, and enlisted) and to wonder whether any congruence can be seen between Plato's class system and the reality of military structure. Although the correspondences are inexact, that does not preclude deriving some benefit from the analogy. Indeed, all analogies are on the whole less true than accurate: life is unlike a box of chocolates in many more ways and in more profound ways than it is like a box of chocolates, but an analogy can still be illustrative if we make clear the limited sense in which it is intended. Plato's notes towards creation of a more cohesive society may be instructive in articulating the whys and wherefores of military culture, and his conception of justice in a hypothetical single-purpose community may be instructive in the context of military justice.

A. Thrasymachus' answer: the interest of the stronger

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<sup>193</sup> *Id.* at 60.

In answer to Socrates' inquiry to define justice, the interlocutor Thrasymachus offers that justice is the interest of the stronger party.<sup>194</sup> This remains the view of law posited by those who see human society as a class struggle between those who have power and property and those who do not. Thrasymachus does not seem to offer this definition as an angry indictment and demand for change, but simply as the unvarnished truth. In all times and ages, there is a temptation to be seen as sophisticated (as it were) by being cynical. Of course, to say that justice is simply the interest of the stronger is to elide justice with power. Socrates attacks this position on several fronts.

Thrasymachus offers that different regimes have different kinds of government, but that each seeks by law to establish the virtue appropriate to the nature of the state:

And the different forms of government make laws democratical [*sic*], aristocratical [*sic*], tyrannical, with a view to their several interests; and these laws, which are made by them for their own interests, are the justice which they deliver to their subjects, and him who transgresses them they punish as a breaker of the law, and unjust. And that is what I mean when I say that in all states there is the same principle of justice, which is the interest of the government; and as the government must be supposed to have power, the only reasonable conclusion is, that everywhere there is one principle of justice, which is the interest of the stronger.<sup>195</sup>

Thrasymachus goes so far as to characterize injustice as preferable because it facilitates the exercise of power, whereas the desire to be just is merely quaint simplicity.<sup>196</sup>

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<sup>194</sup> *Id.* at 17.

<sup>195</sup> *Id.* at 17-8.

<sup>196</sup> *Id.* at 29.

Plato's Socrates finds fault with this rationale even on its own terms, asking Thrasymachus, "whether you think that a state, or an army, or a band of robbers and thieves, or any other gang of evil-doers could act at all if they injured one another?"<sup>197</sup> Thrasymachus concedes that this is not the case because, as Socrates adds, "injustice creates divisions and hatreds and fighting, and justice imparts harmony and friendship."<sup>198</sup> The idea that injustice only appears to be expedient recurs in the political philosophy of Cicero, who wrote of the "specious appearance of expediency."<sup>199</sup>

This destructive power of injustice is, Socrates insists, inherent in its nature, and thus constant, so he demands of Thrasymachus,

Yet is not the power which injustice exercises of such a nature that wherever she takes up her abode, whether in a city, in an army, in a family, or in any other body, that body is, to begin with, rendered incapable of united action by reason of sedition and distraction; and does it not become its own enemy and at variance with all that opposes it, and with the just? Is not this the case?

Yes, certainly [answers Thrasymachus].

And is not injustice equally fatal when existing in a single person; in the first place rendering him incapable of action because he is not at unity with himself, and in the second place making him an enemy to himself and the just?<sup>200</sup>

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<sup>197</sup> *Id.* at 33.

<sup>198</sup> *Id.* at 34.

<sup>199</sup> CICERO, ON DUTIES 315 (DE OFFICIIS) (Walter Miller trans. (1913), Loeb Classical Library, 2001) (circa 45 B.C.). "Specious appearance of expediency" translates "*utilitatis specie*;" the utility itself is specious – not the appearance. (Loeb Classical editions have parallel text, with Greek or Latin on the left page and English on the right.) Cicero was not an avowed Stoic, and a recent biography I perused in the store seemed to portray him as a critic of the Stoics, but his political philosophy owed greatly to and aligned him with the Stoics: "the more he studied and lived, the more of a Stoic in ethics he became." *Id.* at xiii; see also SCHOFIELD, *supra* note 29, at 65-6.

<sup>200</sup> PLATO, *supra* note 1, at 34.



Strictly speaking, the quality of varying from state to state would not disqualify a definition from being accurate – if the quality being defined were of a nature that it could vary from state to state. The crux of Socrates' position is that justice has a universal quality because it derives from nature, and thus must be the same everywhere in nature. Similarly, it operates at each level of nature, the level of the individual and the level of the city.

#### B. The individual and the state in Plato's *Republic*

Plato's famous literary device in the *Republic* is to analogize the structure of the city to the soul of an individual:

[J]ustice, which is the subject of our enquiry, is, as you know, sometimes spoken of as the virtue of an individual, and sometimes as the virtue of a State.

True, he replied.

And is not a State larger than an individual?

It is.

Then in the larger the quantity of justice is likely to be larger and more easily discernible. I propose therefore that we enquire into the nature of justice and injustice, first as they appear in the State, and secondly in the individual, proceeding from the greater to the lesser and comparing them.<sup>201</sup>

This analogy allows Plato's Socrates to shift in scope from the individual to the state, and from the state to the individual, in considering the nature of virtues.<sup>202</sup> Where the

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<sup>201</sup> *Id.* at 52.

<sup>202</sup> *Cf. id.* and *id.* at 135.

individual has intellect, spirit, and appetites, all of which must be kept in balance and governed by reason, the city must have rulers, fighters, and producers, who must perform their functions according to justice:

And a State was thought by us to be just when the three classes in the State severally did their own business; and also thought to be temperate and valiant and wise by reason of certain other affections and qualities of these same classes?

True, he said.

And so of the individual; we may assume that he has the same three principles in his own soul which are found in the State; and he may be rightly described in the same terms, because he is affected in the same manner?<sup>203</sup>

Thus justice is the guiding principle that informs the virtues appropriate to each class. Rulers must have wisdom, not mere conniving cleverness, and the distinction is to be found in justly seeking the common good.<sup>204</sup> Fighters must have fighting spirit, but that spirit must be reined in by a sense of duty.<sup>205</sup> The principal duty of the lower orders is to exercise temperance, defined as “the ordering or controlling of certain pleasures and desires.”<sup>206</sup> This requirement, however, transcends class distinctions:

[T]emperance is unlike courage and wisdom, each of which resides in a part only, the one making the State wise and the other valiant; not so temperance, which extends to the whole, and runs through all the notes of the scale, and produces a harmony of the weaker and the stronger and the middle class....<sup>207</sup>

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<sup>203</sup> *Id.* at 135.

<sup>204</sup> *Id.* at 127.

<sup>205</sup> *Id.* at 128.

<sup>206</sup> *Id.* at 129-30.

<sup>207</sup> *Id.* at 131.

In the case of each of the other three virtues, justice plays the role of arbiter, “the ultimate cause and condition of the existence of all of them,” distinguishing the common good from narrow self-interest, in the sense that one might use one’s abilities only for one’s personal advantage.<sup>208</sup>

## VII. Our question: What is military justice?

We have noted a correspondence between Plato’s hypothetical community, which he constructs according to the premise that values are reconcilable, and the armed forces, in which there is an agreed-upon hierarchy of values. There is similarly a resemblance between the functions Plato ascribes to his social classes and the functions performed by the military classes of commissioned officers, noncommissioned officers, and enlisted personnel.

Officers, like Plato’s rulers, hold fiduciary power to be exercised in furtherance of the common good.<sup>209</sup> Just as Plato posited governing as a *techne* (τεχνη), the profession of arms requires expertise.<sup>210</sup> In *Parker v. Levy*,<sup>211</sup> the United States Supreme Court recognized the qualitative nature of the difference between military authority and civilian legal authority –

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<sup>208</sup> *Id.* at 133.

<sup>209</sup> *Id.* at 111 (“And perhaps the word ‘guardian’ in the fullest sense ought to be applied to this higher class only who preserve us against foreign enemies and maintain peace among our citizens at home, that the one may not have the will, or the others the power, to harm us. The young men whom we before called guardians may be more properly designated auxiliaries and supporters of the principles of the rulers.”) These are the Republics “men of gold.” *Id.* at 112. To the extent this paper’s title refers to Plato’s Guardians, which is only an allusion, it would be to the broader sense.

<sup>210</sup> *Id.* at 59.

<sup>211</sup> 417 U.S. 733 (1974).

using language that recalls our initial natural law model: “That relationship also reflects the different *purposes* of the two communities.”<sup>212</sup> The Court in *Parker v. Levy* found that military law could limit free speech in a manner, and by a mechanism, that might be improper in the context of the society at large.<sup>213</sup>

Noncommissioned officers in the armed forces are the experienced fighters who hold positions of seniority – and great prestige in the eyes of young soldiers. Plato warns that those whose cardinal virtue is spirit are potentially a danger to the state,<sup>214</sup> and he offers justice as the principle of loyalty by which fighters accept the authority of the governing system:

Would not he who is fitted to be a guardian,<sup>215</sup> besides the spirited nature, need to have the qualities of a philosopher?

I do not apprehend your meaning.

The trait of which I am speaking, I replied, may be also seen in the dog, and is remarkable in the animal.

What trait?

Why, a dog, whenever he sees a stranger, is angry; when an acquaintance, he welcomes him, although the one has never done him any harm, nor the other any good.<sup>216</sup>

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<sup>212</sup> *Id.* at 751 (emphasis added).

<sup>213</sup> *Id.* at 752-3. The mechanism in question would be Art. 134, UCMJ.

<sup>214</sup> PLATO, *supra* note 1, at 113 (“[E]very care must be taken that our auxiliaries, being stronger than our citizens, may not grow to be too much for them and become savage tyrants instead of friends and allies.”).

<sup>215</sup> Here, the term “guardian” refers to the fighting case more widely, and the use occurs before the refinement limiting the term to the rulers as noted *supra* note 208.

<sup>216</sup> PLATO, *supra* note 1, at 61.



This correspondence suggests that the ideal noncommissioned officer would be characterized by unquestionable loyalty.

Enlisted personnel would in this extended analogy be the governed class, who share with the other classes the need for the virtue of temperance, to control their “appetites.” This is hardly a flattering characterization to put upon enlisted personnel, but there may be some truth to it: enlisted personnel are overwhelmingly young, and have the virtues and vices of young, including energy that can be constructive or destructive. Moreover, we may construe this quality as essentially positive unless excessive. The young people who volunteer to serve in the United States armed forces have by that act demonstrated their capacity to channel their energy. The role of enlisted personnel is to serve at the direction of others, but this role is not servile because its end is to further the common good, which is national security.

As we noted, justice in Plato’s view could not be the interest of the stronger party because then it would be variable, whereas the justice he seeks to define is the universal principle of justice. Thus justice is essentially the same for the individual or for the city. Similarly, justice does not cease to be justice because it operates in the context of the governance of the armed forces. The classes of military personnel have necessary roles, which we have loosely analogized to Plato’s classes, not because the analogy is precise but rather to show that justice remains the operation of reason in the exercise of the virtues appropriate to each role.

A. Is “good order and discipline” simply the interest of the stronger?

To posit a dichotomy between justice in a particular case, on the one hand, and maintaining good order and discipline on the other hand, presupposes that in some cases injustice to an individual is necessary to maintain good order and discipline.<sup>217</sup> An example would be the idea of “making an example” of someone for the sake of deterrence. In this sense, the individual might suffer a more severe sentence than specific deterrence (of the individual) would require, to the end that others would be deterred.

This example is actually a false dichotomy. If general deterrence is a valid state interest in furtherance of good order and discipline in the armed forces, then to take general deterrence into account in formulating a specific sentence is not unjust.<sup>218</sup> The fact that the individual may suffer a marginally (in the economic sense) greater penalty is not inherently unjust in this context, any more than it is inherently unjust for individuals to pay taxes.

A more direct conflict of values arises if an innocent individual were to be convicted and sentenced to convey a message of deterrence. Imposition of punishment could have a deterrent effect against future disorder, even where the punishment was unjust – and possibly

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<sup>217</sup> One morning in 2002, I was trying to sail a small rental sloop on the Potomac well enough to convince the marina to let me take their boats out. The sailing instructor, to whom sailing such a boat was child’s play, learned that I was a judge advocate and revealed that he was a retired Army officer. He then asked me whether the purpose of military justice was to do justice in each particular case or to maintain good order and discipline. At the time, I was as poleaxed as the lamest Socratic interlocutor, especially because the wind kept shifting.

<sup>218</sup> “Am I to congratulate an highwayman and murderer, who has broke prison, upon the recovery of his natural rights?” BURKE, *supra* note 92, at 90.

even where the punishment was seen as unjust, though in that case deterrence might be enhanced but loyalty diminished.

The possibility that unjust deterrence could contribute to discipline is reinforced by the fact that Plato does not oppose lying for reasons of state. "Then if any one at all is to have the privilege of lying, the rulers of the State should be the persons; and they, in their dealings either with enemies or with their own citizens, may be allowed to lie for the public good."<sup>219</sup> He proposes deliberate falsehood in the form of mythology that encourages good behavior.<sup>220</sup> Of course, the discovery of false dealing would be disillusioning and would greatly undermine cohesion, making such a course of action dubiously prudent on practical grounds. The best case against falsity in the imposition of military discipline, however, may not be in the debate about whether it might work if the cover-up is carefully orchestrated, but rather in the fact that it is precluded by the external authority to which the armed forces are subject.

#### B. The individual in the military justice system

The armed forces also differ from the larger society in that they recognize an authority not of their own creation. While the citizens of a republic are free to make and alter their constitution and laws, members of the armed forces act within a framework of law that they may not, as members of the armed forces, change or contravene. This element of

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<sup>219</sup> PLATO, *supra* note 1, at 78.

<sup>220</sup> *Id.* at 73-77, 83, 112 *passim*.

military justice precludes any possible legitimacy to an act of scapegoating or, as the newer phrase runs, throwing an individual under the bus, even for the sake of deterrence or another common good.

In military justice, “good order and discipline” is not a pretty name for the interest of the stronger party because good order and discipline is part of the common good in that it promotes national security. All classes of the armed forces, and the society the armed forces serve, benefit from good order and discipline. An individual may have to bear the cost of a common good such as deterrence, but military justice does not allow the possibility that an individual would suffer systemic injustice for the common good, principally because systemic injustice would violate externally-imposed law to which the armed forces must adhere.<sup>221</sup> This is true as a matter of positive law – and as a natural law obligation, the violation of which would harm the purpose of the legal system.

Returning now to the specific question of panel composition, we see the superficiality of the criticism of panel composition must be unfair because it is not democratic in nature. Opponents of the current system of panel composition might argue that the system is unconstitutional or undemocratic, but these objections follow from premises that we have now demonstrated are inapposite. At the level of positive law, the constitutional attack seems almost untenable in light of the United States Supreme Court decisions to the effect that the VI Amendment does not apply to the military accused. The current state of the law

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<sup>221</sup> *Parker v. Levy*, 417 U.S. 733, 751 (1974) (“The military establishment is subject to the control of the civilian Commander in Chief and the civilian departmental heads under him, and its function is to carry out the policies made by those civilian superiors.”).



on these points is reasonably settled, and this paper demonstrates that the current practice of panel selection accords with the natural law principles applicable to a paramount-purpose community, in which pluralistic representative juries are not appropriate.

Objections to the current method of panel composition may include (a) the exclusion of junior officers or junior enlisted members and (b) the potential for “unlawful command influence,” which is interference with the integrity and independence of the court-martial. Neither of these issues goes to the heart of the radical egalitarian objection to Article 25.

In the first place, exclusion of junior enlisted has been conceded by the military courts as veritably inseparable from the valid Article 25(d)(2) criteria of “age, education, training, experience, length of service, and judicial temperament.”<sup>222</sup> Everyone ages, but “education, training, experience, and length of service” result in rank progression in the military, except for those who have disciplinary problems – who would then be manifestly unsuitable as lacking in “judicial temperament.”

The exclusion of junior officers (lieutenants and warrant officers) is disfavored as a matter of law,<sup>223</sup> but remains the common effect of the merit criteria listed in Article 25(d)(2), largely because junior officers are most commonly young people who have only recently completed their education (there is one qualifying factor), but who have very little

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<sup>222</sup> See *United States v. Yager*, 7 M.J. 171 (C.M.A. 1979).

<sup>223</sup> See *United States v. Daigle*, 1 M.J. 139 (C.M.A. 1975).

advance training, experience, or length of service.<sup>224</sup> The relative paucity of former-enlisted personnel in the officer corps forms part of the argument that the military remains a class system, and that military justice is systemically undemocratic.

Further, prevention of “unlawful command influence” (interference with the integrity and independence of a court-martial by the convening authority or others in the military hierarchy) does not obviate the inherently undemocratic character of court-martial composition. Article 37 forbids any attempt to coerce or influence court-martial members or to punish or retaliate against them for their exercise of independent judgment.<sup>225</sup> Operating effectively, the ban on unlawful command influence means that a court-martial will be decided by the members of the elite class who sit on the panel, rather than other members of the elite class. This has the virtue of transparency but does not eliminate the class distinction.

More to the point of fundamental fairness was the nexus of panel composition and command influence addressed by the Court of Appeals for the Armed Forces in *United States v. Wiesen* in 2001.<sup>226</sup> The question in *Wiesen* was whether a court-martial appeared to be fairly constituted when its members were overwhelmingly direct subordinates of the senior member.<sup>227</sup> There were ten members, and the senior officer was a brigade commander who

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<sup>224</sup> See *United States v. Fenwick*, 59 M.J. 737 (A.F. Ct. Crim. App. 2003).

<sup>225</sup> UCMJ art. 37.

<sup>226</sup> *United States v. Wiesen*, 56 M.J. 172 (2001).

<sup>227</sup> The case was decided on the basis of implied rather than actual bias. *Id.* at 175-6. Also, the determination hinged on the fact that although the appellant had only one peremptory challenge, which he used to strike off the brigade commander. Although eliminating the senior member struck the head off the pyramid of the rank

held “a supervisory position over six of the other members, and the resulting seven members [made] up the two-thirds majority sufficient to convict.”<sup>228</sup> Thus the matter was neither improper selection by the convening authority in contravention of Article 25, nor improper influence by someone outside the panel in violation of Article 37, but rather the presence on the court-martial panel of so many members who reported to the senior panel member.

The Court of Appeals found that public confidence in the fairness of courts-martial would be damaged by such court composition, which could be justified by military operational necessity but not by mere happenstance.<sup>229</sup> The sum effect of *Wiesen* is that although a court-martial panel is composed of the convening authority’s subordinates, the panel may not include an effective majority of members who directly report to *a member of the panel*.

This rather limited check on the power of convening authorities occasioned alarm on the part of “commanders’ system” partisans such as Army Major Christopher W. Behan,<sup>230</sup> who interpreted it as “judicial activism” and possibly a step towards random panel member selection<sup>231</sup> as advocated by merit selection critics like Marine Corps Major Guy P.

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structure, defense counsel had noted for the record that the defense would have struck another member if its challenge for cause against the senior member had been upheld. *Id.* at 177.

<sup>228</sup> *Id.* at 175. Appellate defense counsel facetiously referred to the panel composition as a brigade staff meeting. *Id.* at 176.

<sup>229</sup> *Id.*

<sup>230</sup> Behan, *supra* note 166.

<sup>231</sup> *Id.* at 195 (“An activist majority of the CAAF recently opened a new front in this war in the controversial case of *United States v. Wiesen* . . .”).

Glazier.<sup>232</sup> Major Glazier's 1998 article on panel selection was a frontal assault on the fundamental fairness<sup>233</sup> and constitutionality<sup>234</sup> of trial by court-martial as currently constituted. Major Behan's thorough response stressed continuing congressional approval of convening authority panel selection.<sup>235</sup> That response succeeds on its own terms, and if this paper is read as a prolegomenon to his constitutional and practical defense, the case is compelling.

## VII. Conclusion

We have seen that Plato proposed to construct a just city based on his conception of how best to facilitate human development. In broad terms, Plato, Aristotle, and many of the other theorists and critics discussed in this paper have agreed that civic society should be constructed and evaluated based on an understanding of human nature. This postulation

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<sup>232</sup> Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three – Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1 (1998). The first vexed question in this debate between MAJ Behan and MAJ Glazier is which title is worse, but I think the palm goes to Major Glazier.

<sup>233</sup> "At best, military jury selection incorporates the varied individual biases of numerous convening authorities and their subordinates. At worst, it involves their affirmative misconduct." *Id.* at 4.

<sup>234</sup> "Put bluntly, the practice is unconstitutional." *Id.* at 6.

<sup>235</sup> The essentially legal positivist nature of MAJ Behan's argument is apparent in the title of his article: he characterized the convening authority as Superman, but the Constitution vests plenary authority in Congress, which at any time could restructure military justice to eliminate the commander's role in military justice. Major Behan demonstrates beyond reasonable dispute that judicial (meaning Article III judicial) and congressional deference to the needs of military command is good policy; note, however, that it is not constitutionally required – hence the danger perceived by MAJ Behan. That said, MAJ Behan's article succeeds in its own terms as a defense of court-martial composition in "historical, constitutional, and practical dimensions" and my hope is that this paper underpins his practical defense of court-martial composition. Behan, *supra* note 166, at 196.

resonates with Plato's idea of governing as a craft, and with Aristotle's idea that happiness (meaning fulfillment of one's nature) is the end towards which our actions are the means.

We have also noted that although human nature is not infinitely variable, there can be differences in the ranking of values by different societies – and by different groups and individuals within a society, in which case there must be tolerance or conflict. Attempts to impose a single vision of the ideal society underlay the massive bloodletting of the XX Century. Acceptance of divergent views in a pluralistic society, rather, is consonant with the philosophical underpinnings of democracy that are widely accepted in the West.

Yet pluralism is, in a manner of speaking, out of place in the armed forces, where there is an agreed-upon hierarchy of values and the existence of external authority. Indeed, in this context, we see that the practical limitations of Plato and Aristotle's teleological theories do not obtain in the same way. By viewing the armed forces as a single-purpose society, we see more clearly in contradistinction the pluralist society, and we identify a source of legitimacy distinct from democratic sanction.

The model of military justice created by application of the teleological method and Plato's critical apparatus is that military justice is the maintenance of good order and discipline as a means towards the ultimate end of national security, subject to the external authority of civilian control of the armed forces. Within this context, court-martial panels may be understood as duty for which merit selection is possible in a way that does not obtain in our pluralistic society as a whole. We make such distinctions because we do not wish to



follow Plato or Sparta in organizing our entire society for the single purpose of winning wars, but we do wish that a specialized segment of our society be constructed, subject to the external restraint of civilian control, on the basis of national security as its paramount purpose.